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51
REPORTS OF CASES

June 26
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DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF WASHINGTON,

CONTAINING

DECISIONS RENDERED FROM MARCH 1, TO JULY 11, 1893, INCLUSIVE.

EUGENE G. KREIDER,
REPORTER.

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Rec. July 23, 1894.

**JUDGES OF THE SUPREME COURT OF THE STATE
OF WASHINGTON.**

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HON. THEODORE L. STILES, . . . JUDGE.
HON. JOHN P. HOYT, JUDGE.
HON. ELMON SCOTT, JUDGE.
HON. THOMAS J. ANDERS, JUDGE.

•

MR. C. S. REINHART, *Clerk.*

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Whatcom and San Juan,	Hon. J. R. WINN.

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REPORTS OF CASES
DECIDED IN
THE SUPREME COURT
OF THE
STATE OF WASHINGTON,
AT THE
JANUARY SESSION, 1893.

[No. 622. Decided March 1, 1893.]

**ZEPHANIAH J. HATCH *et ux.*, Appellants, v. TACOMA,
OLYMPIA & GRAY'S HARBOR RAILROAD COMPANY, Re-
spondent.**

**DAMAGES—RAILROAD IN STREET—INJURIES TO ABUTTING PROP-
ERTY—PLEADING—CITY AS PARTY DEFENDANT.**

In an action for damages to abutting property from the construction and operation of a railroad in a street, an answer by the railroad company which is, in effect, a plea of license from the city to construct and operate their railroad in the street cannot be stricken out on the ground of irrelevancy or immateriality.

In an action against a railroad company for damages caused by raising the grade of a street five feet, thereby shutting off access thereto from abutting property, an answer alleging that the right to enter upon the street and change the grade thereof was authorized by an ordinance of the city is demurrable for want of sufficient facts, when the charter of the city, while authorizing the grant of franchises to lay railway tracks, provides that "no railway track can thus be laid down until the injury to property abutting upon the street . . . has been ascertained and compensated." (Hoyt, J., dissents.)

Where a city enacts an ordinance, under its charter, granting the privilege to a railroad company to tunnel a street, build a bridge over it, and lay a railroad track therein, the city is not liable therefor, and the dismissal of the action against the railroad company for plaintiff's failure to make the city a party defendant is error.

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6	995
32*	1063
32*	1067
6	1
7	154
32*	1063
34*	552
6	1
11	636
111	639
32*	1063
40*	138
40*	139
6	1
15	211
6	1
29	25

Appeal from Superior Court, Thurston County.

Allen, Ayer & Franklin, for appellants.

Mitchell, Ashton & Chapman, for respondent.

The opinion of the court was delivered by

ANDERS, J.—The appellants sued the respondent to recover damages alleged to have been occasioned to their property by the building and operating of a railroad along Seventh street, in the city of Olympia. The complaint alleges:

“3. That on said date plaintiffs became the owners in fee, and obtained possession, and are now such owners, and have possession, and at all times hereinafter mentioned were such owners, and had possession, of that certain tract of land situate at the northeast corner of Franklin street and Seventh street, in the city of Olympia, county of Thurston and State of Washington, known, designated, and numbered on the original plat of the town (now said city) of Olympia as lots numbered, respectively, eight (8) and seven (7), in block numbered thirty-six (36), which plat is, and for many years has been, on file in the auditor's office of said county; said lots being the southwest quarter of said block.

“4. That each of said lots fronts, and is sixty (60) feet wide, on said Seventh street, and extends northward, at right angles with said street, one hundred and twenty (120) feet; the west line of said lot numbered eight (8) being on Franklin street aforesaid.

“5. That plaintiffs are the owners in fee of so much of the land on which Seventh street aforesaid is located as lies on the front of, and adjacent to, said lots, and extends to the middle line of said street, and they are the owners in fee of so much of the land on which said Franklin street is located as lies on the west of, and adjacent to, lot numbered eight (8), and extends to the middle line of said Franklin street. Each of said streets is sixty (60) feet wide.

“6. Plaintiffs say that heretofore, to wit, on the —

Mar. 1893.] Opinion of the Court — ANDERS, J.

day of May, 1891, and on divers and sundry days thereafter, the defendant, the Tacoma, Olympia & Gray's Harbor Railroad Company, aforesaid, its officers, agents, servants and employes, without the consent of these plaintiffs, or of either of them, and wrongfully and unlawfully, entered upon the land of plaintiffs on Seventh street, described in the fifth paragraph of this complaint, and without the consent of plaintiffs, or either of them, and wrongfully and unlawfully, did dig up and carry away the soil thereof, and did cut a deep tunnel along and across said land, to the full extent of the width and length of said Seventh street, in front of said lots, and greatly to plaintiffs' damage.

"7. That plaintiffs' said land, described in paragraphs 3 and 4 herein, is improved property, and has thereon a valuable dwelling house, in which plaintiffs reside, and have for several years resided, and other valuable buildings, fruit trees, and other improvements.

"8. That the said defendant, its officers, agents, servants and employes, have constructed a railway along said tunnel, and have covered said tunnel with timbers and plank for the purpose of making a roadway over said tunnel and along said Seventh street, for public travel and passage, and have wrongfully and unlawfully changed and raised the grade of said street five (5) feet above the grade that had been established theretofore on said street by the city of Olympia, and that existed at the time said tunnel was cut and made as aforesaid.

"9. That said defendant, its officers, agents, servants and employes, have wrongfully and unlawfully changed and raised the grade of Franklin street, making the approach on said street to said covered way five (5) feet at the point said street intersects with said covered way, and have wrongfully and unlawfully extended said altered grade along said Franklin street, in front of said plaintiffs' said land, buildings and improvements.

"10. That said defendant, its officers, agents, servants and employes, by doing the acts and things alleged in paragraphs 8 and 9 herein, have put and left plaintiffs' aforesaid lots, buildings and improvements at a depth of five (5) feet below the top of said covered way on Seventh

street, and at the intersection of Seventh and Franklin streets, and along Franklin street, have destroyed ingress and egress to and from said property on Seventh street, and for one-half the length thereof on Franklin street, and have thereby greatly impaired and lessened the value of said lots, buildings and improvements.

“11. That said defendant is actively engaged, through its officers, agents, employes and servants, in operating its railroad, and in running passenger and freight trains, drawn by steam engines, along and through said tunnel daily, and that in so doing the smoke and sparks from said engines are thrown off in said tunnel in great quantities, and the rumble and noise produced by said trains are very great, and that plaintiffs’ residence and buildings aforesaid are daily endangered and rendered unsafe and uncomfortable thereby, and the value thereof materially and greatly impaired and lessened.

“12. That said defendant, its officers, agents, servants and employes, by reason of the acts and things alleged herein, have damaged plaintiffs in the sum of five thousand (\$5,000) dollars.”

The respondent filed an answer admitting the construction and operating of the railroad as set forth in the complaint, but denying any knowledge or information sufficient to form a belief as to the ownership of the property described in the complaint; denying that plaintiffs are the owners of the fee to the middle line of the streets adjoining said premises; that defendant raised the grade of said streets to any extent whatever, or that it destroyed ingress or egress to and from said property on said streets, or that it thereby, or at all, has lessened or impaired the value of said lots, buildings or improvements, or either of them; that, in running its trains along and through said tunnel, the smoke and sparks from said engines are thrown off from said tunnel, or that the rumble and noise produced by said trains are very great, or great at all, or that plaintiffs’ residence or buildings are injured or rendered unsafe or uncomfortable thereby, or that any of the acts com-

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plained of were wrongfully or unlawfully done, or that plaintiffs have been damaged by any acts of defendant in any sum whatever. And, as a further answer, defendant alleged:

“1. That at all the times herein mentioned it was a railroad corporation, duly incorporated under and by virtue of the laws of the State of Washington, and that the uses and purposes of said corporation for which it was so incorporated, and in which it is and at all times in said complaint mentioned was engaged, constitute and are a public use.

“2. That Seventh and Franklin streets of the city of Olympia are, and at all the times in said complaint mentioned were, and for upwards of twenty years immediately preceding any of the times mentioned in said complaint had been, public streets and highways of said city, and at a time many years prior to the plaintiffs, or either of them, acquiring any right or interest in and to the lots, or either of them mentioned in said complaint, had been designated and laid down upon the original plat of said city, and donated and granted to the public forever upon said plat, designated and laid off as such, and which said plat had theretofore, to wit, at a time more than twenty years prior to any of the times mentioned in said complaint, been recorded in the office of the auditor of said Thurston county, in which said city of Olympia is and was situated.

“3. That at all the times mentioned in said complaint and herein, said city of Olympia was duly incorporated as a municipal corporation under and by virtue of the laws of the then Territory of Washington.

“4. That on the 10th day of June, 1890, pursuant to the powers and authority by law invested in it, and under and by virtue of the express power and authority conferred by an act of the legislature of the Territory of Washington, passed and approved on the 28th day of November, 1883, entitled ‘An act to incorporate the city of Olympia,’ the mayor and city council of said city of Olympia did, by an ordinance, No. 399, of said city, entitled ‘An ordinance granting a right-of-way to the Tacoma, Olympia & Gray’s Harbor Railroad Company over certain streets and alleys,

and authority to construct a railroad and lay out depot grounds within the city of Olympia, ' authorize and grant the defendant the right and privilege of constructing, equipping, maintaining and operating its line of railway over, along, through, across and under certain streets and alleys of the city of Olympia, and, among others, Seventh and Franklin streets aforesaid, which said grant so conferred was accepted by the company.

"5. That under and by virtue of said ordinance so passed, this defendant, through its proper officers and agents, did construct its line of railroad along and under Seventh street aforesaid at or about the time mentioned in said complaint, and has since the construction thereof and pursuant to the powers in said ordinance conferred, operated, and still continues to operate and maintain, its line of railroad, which constitute the acts and things mentioned and set forth in plaintiffs' complaint, and not otherwise, and that all of said acts and doings were had and done by and with the express permission of mayor and city council of said city of Olympia, as hereinbefore set forth, and not otherwise, and that said city had and has full power and authority of law to so ordain and grant permission to this defendant so to do."

The plaintiffs moved the court to strike out all of the affirmative matter set up in the answer, for the alleged reason that the same is immaterial and irrelevant. The motion was denied, and plaintiffs excepted. Plaintiffs then demurred to the same on the ground that it did not constitute a defense to the action. The court overruled the demurrer, and plaintiffs saved an exception. The defendant thereupon moved that the city of Olympia be made a party defendant, which motion the court sustained, and subsequently made an order requiring the plaintiffs to make the city a party defendant within three days. The plaintiffs declined to comply with said order, whereupon a judgment of nonsuit was entered against them, and the action dismissed at their costs. The plaintiffs seek a reversal of

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this judgment on the ground that the several rulings above mentioned were erroneous.

The first objection, that the court erred in denying appellants' motion to strike out the portion of the answer therein referred to, is not well taken. The statute provides that, if irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of any party aggrieved thereby; and matter is irrelevant which has no bearing upon the question in controversy. If an answer alleges matter as a defense which is clearly impertinent to the cause of action, it may be stricken out as irrelevant. But if there be a doubt as to the sufficiency, in law, of the pleading, or if the alleged irrelevancy requires argument to establish it, the question should not be raised by motion, but by demurrer, which is the recognized mode of questioning the legal sufficiency of pleadings. The primary object of such a motion is to eliminate irrelevant and redundant matter from a pleading, and it is always supposed that something substantial will still remain. See Bliss, Code Pl., §§ 423, 424. And if an answer, as a whole, sets up a semblance of a defense to the action, its sufficiency cannot be determined on a motion to strike it out as irrelevant. *Walter v. Fowler*, 85 N. Y. 621. In this case, the part of the answer which appellants seek to strike out is, in effect, a plea of license from the city of Olympia, and is relied on by the respondent as a complete defense to the action. It is therefore neither irrelevant nor immaterial, and consequently not open to the objection urged against it. But its sufficiency was properly called in question by the appellants' demurrer, which was interposed on the alleged ground that the plea constitutes no defense to this action. It is claimed by the learned counsel for the respondent that the railroad was constructed in accordance with the ordinance of the city, and that, inasmuch as the city was empowered by its charter to authorize the build-

ing and operation of railroads in and upon its streets, such construction and operation of the road were and are lawful, and respondent is not liable to the appellants for any injury thereby done to their property. It is further insisted that, if appellants are entitled to any damages whatever, the city is liable therefor, and not the respondent. It is conceded that the city had the power to authorize the construction of the railroad on Seventh street, upon proper conditions, and it is not disputed that the railroad was constructed under authority given by the city; but it is claimed by the appellants, (1) that the power vested in the city by the legislature was exceeded in the ordinance under and by virtue of which the right to build the railroad in the street in front of appellants' premises was granted; and (2) that the authorization of the city was necessarily subject to, and limited by, § 16 of article 1 of the constitution of the State of Washington, which provides that "no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner," etc.

In order to determine the validity of the ordinance set forth in the answer as a defense to the action, it becomes necessary to ascertain what power was conferred upon the city of Olympia by its charter in regard to the construction of railroads upon the streets and public places, as well as the provisions of the city ordinance itself. In § 10 of the charter it is provided that—

"The city of Olympia shall have power . . . to authorize or prevent the location and laying down of railway tracks and street railways on all streets, alleys and public places; and no railway track can thus be laid down until the injury to property abutting upon the street, alley or public place upon which such track is proposed to be located and laid down, has been ascertained and compensated in the manner provided for compensation of injuries arising from re-grade of streets in § 113 of this act." Laws 1883, p. 109.

From this provision it appears that while the legislature empowered the city to authorize the location and laying down of railway tracks on the streets, in its discretion, it did not thereby undertake or assume that such authorization should operate as a shield against liability on the part of the grantee of such franchise to any lot owner upon the street for damages caused by the location of a railway thereon. This is manifest from the language used, and no other interpretation can be given to it. Indeed, when the legislature declared that no railroad track can thus be laid down until the injury to property abutting upon the street upon which such track is proposed to be located has been ascertained and compensated in a certain prescribed manner, it virtually made it the duty of the city to withhold the privilege of laying down railways in the streets until compensation is made for injuries thereby sustained by abutting owners. The city, under its charter, had not itself the right to change the grade of streets without paying the damages resulting therefrom to owners of abutting property who had made improvements thereon with reference to the established grade, and therefore could not legally authorize the railroad company to do so. Nor did it undertake to confer such right in this instance, except at street crossings and approaches thereto. The ordinance in question provided that the railway company should construct its railroad in a cut or tunnel between certain specified streets, at its own expense, and not more than forty feet in width at any one point, and should wall in or timber up the sides thereof in a safe and secure manner, and for the entire distance thereof, up to the grade of Seventh street, or to any grade that might be adopted by the city council, and that said company should cover said cut, and maintain the same in good condition for public travel, in such a manner as to interfere with the use of said street in the least possible degree, and that the bridge or cover over

the same at Franklin street should not be more than three feet above the established grade at said point. The respondent contends that under the issue raised by the demurrer it must be assumed that the grade of the streets was changed, if at all, only to the extent and in the manner prescribed by the ordinance, and, further, that if the railroad was constructed as authorized by the ordinance, then the appellants' property, in legal contemplation, was not damaged, and they are entitled to no compensation, at least from the railroad company. But we are unable to accept these propositions as conclusive. Even if it be admitted, for the purposes of the demurrer, that the fee of the street is in the city, as claimed by respondent, it does not follow that the appellants have not sustained direct and immediate damage by the building of the railroad in front of their premises. In any event, if the appellants' property has been damaged in a manner different from that of the public generally by the appropriation of the street for railroad purposes, they are entitled to compensation; and damages, to be recoverable, are not confined to the land itself, but may only affect that which is incident thereto, and necessary to the use thereof. The owner of a lot on a street in a city has a right to the use of the adjoining street which is distinct from that of the public, and such right is as much property as the lot itself (*Rude v. City of St. Louis*, 93 Mo. 408, 6 S. W. Rep. 257; *Burkam v. Ohio, etc., Ry. Co.*, 122 Ind. 344, 23 N. E. Rep. 799), and cannot be taken away or injuriously affected, without compensation. It is alleged, in substance, as we have seen, in the complaint, that the respondent raised the established grade of the street in front of appellants' land five feet, and thereby destroyed access to the same, without the consent of appellants. That allegation shows a cause of action in favor of appellants, and we think that the affirmative matter demurred to in no wise constitutes a defense thereto.

The grant of the city transferred no rights of the appellants to the respondent. It simply granted such rights as the city had power to confer; and it had no power, as we have already intimated, to authorize any interference with the proprietary rights of the appellants. It follows, therefore, that the demurrer should have been sustained.

But it is urged on behalf of the respondent that, if any recovery can be had in this action, the city is the party liable, and not the railroad company. This contention cannot be sustained. It is not shown or alleged that the city did any of the acts or things of which appellants complain. It only enacted the ordinance granting the privilege to the respondent to use the street in the manner therein specified, and for that act no private action will lie. *Elliott, Roads & S.*, 532; *Burkam v. Ohio, etc., Ry. Co.*, *supra*. And, the city not being liable to be sued for its action in permitting the respondent to construct its railroad in the streets in the manner it did, it follows that the court erred in dismissing the action for failure to make the city a party defendant.

Some other questions were raised by counsel in their briefs, which we have not deemed it necessary to consider in passing upon the issues raised by the pleadings.

The judgment is reversed, and the cause remanded to the court below, with directions to sustain the demurrer to defendant's special answer.

DUNBAR, C. J., and SCOTT and STILES, JJ., concur.

Hoyt, J. (*dissenting*).—I am unable to concur in the foregoing opinion. I think that, under the peculiar provisions of its charter, the city of Olympia is alone responsible to adjoining owners for damages to their property caused by the construction and operation of a railroad in the street in front thereof. Sec. 10 of said charter provides that no railroad shall be laid down in any of the streets of the city until such damages have been ascertained

and paid, and contains an express provision that such damages shall be ascertained in the manner provided for in §113. The provisions of said §113 are applicable to the ascertainment of damages as between the city and the property owner, but are entirely inapplicable as between a private corporation and such owner. It follows that, if the provisions of said sections are to be given force, there was no way provided by law by which the railroad could have proceeded to have the damages ascertained and paid before its construction, while the power of the city in that regard was ample. I see no reason whatever why these two sections cannot be given full force, and, if they can, the well settled rule of construction makes it the duty of the courts so to do. The provisions of said sections are plain and unequivocal, and thereunder it is made the duty of the city not to allow a railroad to be constructed on any of the streets of the city until the damages have been first ascertained, and the machinery for the ascertainment of such damages is fully provided, as between the city and the adjoining owner. In view of these facts, I think it should be held that the city, in legal effect, so far as the rights of adjoining proprietors are concerned, is the agency which affects their property; that their rights must be adjusted with the city. It does not follow that the city will necessarily bear the burden of the damages which may be assessed. It has power to fully protect itself at the time it grants the right to the railroad to occupy the street. The numerous authorities cited in the opinion of the majority of the court do not seem to me to be at all applicable to the case at bar. In none of them was the question of the construction of a charter at all like this one involved. This case, to my mind, turns entirely upon the construction of the two sections of the charter above referred to; and I see no escape from the conclusion that, whenever the city passes an ordinance authorizing the use of any of its streets

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for railroad purposes, it becomes responsible to those owning property adjoining such streets for all damages growing out of an occupation by a private corporation in pursuance of the provisions of the ordinance granting such rights, and that under such provisions there could be no liability on the part of the corporation occupying the street, so long as it kept within the terms of the ordinance authorizing it so to do. The ordinance granting rights to the defendant in this case was therefore material; and, if the pleading on the part of the defendant showed that it was acting thereunder, and in pursuance of the rights thereby granted, such pleading set up a good defense to the action. Under the circumstances of the case the city of Olympia might not have been a necessary party to the action; but no harm could result to the plaintiffs by having the whole matter adjudicated in one suit, rather than to have the question of the liability of the railroad company first determined, and then, if it was found that it was not liable, have the question of the liability of the city determined in a separate action. In my opinion the demurrer to the separate defense was rightfully overruled; no error prejudicial to the plaintiff appears in the record; and the judgment ought to be affirmed.

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13	633

[No. 708. Decided March 1, 1893.]

PETER TIMM, *Respondent*, v. D. STEGMAN *et al.*, *Defendants*, AND A. HEMRICH, *Appellant*.

PROCEEDINGS SUPPLEMENTARY—GARNISHMENT—PRACTICE—
APPEAL.

In garnishment proceedings supplementary to execution it is unnecessary that the affidavit filed as a basis for the order summoning a garnishee should state that execution had been issued against the judgment debtor.

On appeal from a judgment against a garnishee in such proceedings, the fact that execution was issued against the principal debtor should appear in the statement of facts, as it is a jurisdictional matter that the garnishee has no right to waive.

Judgment against a garnishee is unwarranted where it appears from the evidence that he signed a promissory note in his own name in favor of the principal debtor, but that his liability thereon was in fact as a trustee for others; that the note was not due; and that it was in the hands of a third party not before the court.

Appeal from Superior Court, Pierce County.

Parsons & Corell, and Blaine & De Vries, for appellant.

Heilig & Hartman, and W. H. Reid, for respondents.

The opinion of the court was delivered by

SCOTT, J.—Respondent Peter Timm obtained a judgment against D. Stegman, Samuel S. Loeb and John Frazier in the superior court of Pierce county, and the appellant was summoned to appear and answer, under §§ 524 and 525, Code Proc., relating to proceedings supplementary to execution. Judgment was rendered against the appellant in said proceedings, and he alleges that the same was erroneous: First, Because the affidavit which was filed as a basis for the order summoning him to appear did not state that an execution had been issued upon the judgment. We do not think it is necessary that the affidavit should state that an execution had been issued. The statute provides that after the issuing or return of an execution, etc., upon proof by affidavit or otherwise to the satisfaction of the judge, that any person or corporation has any property of said judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may require such person, or an officer of the corporation, to appear, at a time and place specified, before him, or a referee appointed by him, and answer concerning the same. The affidavit required only goes to the proof of indebtedness to, or possession of,

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property of the judgment debtor. The judge would take judicial knowledge of the fact that an execution had been issued in his own court, and it would be unnecessary to make proof of that fact by affidavit. But in the statement of facts in this case it does not appear that an execution had been issued, and the judge certifies that all the material facts in relation to such proceedings are contained in such statement. An essential fact necessary to the jurisdiction of the court in this matter was the rendition of a valid judgment against the principal debtor, and the issuance of an execution thereon. Otherwise the court had no jurisdiction to make the order requiring the appellant to appear, and the appellant had no right to waive a jurisdictional matter in the premises. Such proceedings are *in rem*, whereby the execution creditor seeks to subject the property of the execution debtor to the satisfaction of his debt, and the requirements of the statute necessary to bring such property within the jurisdiction of the court must be complied with. *McDonald v. Moore*, 65 Iowa, 171 (21 N. W. Rep. 504).

At the hearing held in pursuance of such order the appellant testified as follows:

“Q. Mr. Hemrich, do you owe Mr. D. Stegman anything on a note or otherwise? If so, state fully. A. I signed a note for Stegman as trustee for the brewers here; not individually.

“Q. How much was that note for? A. It was for \$6,500 with \$2,000 paid, which left a balance due on the note of \$4,500.

“Q. How much do you still owe on that note? A. \$4,500.

“Q. When was it due? A. On the fifteenth of February, 1892.

“Q. Do you remember, Mr. Hemrich, when that note was made whether there was anything said about its being made to Stegman, personally, or to Stegman's order? A. I was under the impression at that time that something was

said about it to be made to Stegman. Whether it was or not, I don't know. I don't want to swear to this point, because I am not positive about it.

"Q. Do you remember when this note was given, Mr. Hemrich? A. I can't state; it was done at the same time this note was made.

"Q. Do you identify that note? A. Yes, sir; it is my signature.

"Q. Was that note made to Stegman in all respects similar to this? A. I can only identify my own hand writing. I did not read the note, only so far as the amount, and could not swear whether it was negotiable or not. We spoke of it at the time it should be so. Whether it was made out that way or not, I don't know.

"Q. Where is that note now, if you know? A. It was in the hands of one Trounce.

"Q. Can you state, Mr. Hemrich, whether that note was a negotiable or non-negotiable note, definitely? A. No, I cannot state positively.

"Q. And that is the only matter upon which you are indebted to Mr. Stegman in any way. A. Yes, sir.

"Q. And that is as trustee. A. As trustee for a number of persons.

"Q. Mr. Hemrich, did you sign that note as trustee, or sign it in your individual capacity? A. There was nothing upon the note to show that it was signed as trustee; only my individual name appears upon the note. There is nothing on the note to indicate that it was done as trustee."

There was no such admission in the testimony as would warrant the rendition of a judgment against the appellant. Before such a judgment can be rendered it must clearly appear that the person summoned has property belonging to the judgment debtor, or that he is indebted to him. In this case it did not appear that Mr. Hemrich owed this debt individually, although he signed the note individually, but he claimed that his liability thereon was as a trustee for others. Furthermore, it appears that the note was not then due (his testimony was given January 23, 1892), and that

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it was not in the hands of the judgment debtor, but in the hands of a third party not before the court. Upon this testimony the court had no authority to render any judgment against the appellant.

The judgment is reversed.

DUNBAR, C. J., and ANDERS and STILES, JJ., concur.

HOYT, J., concurs in the result.

[No. 774. Decided March 1, 1898.]

WILLIAM M. CALHOUN, *Respondent*, v. JOHN LEARY, JACOB FURTH AND LEARY-COLLINS LAND COMPANY, *Appellants*, AND M. V. B. STACY *et al.*, *Respondents*.

HUSBAND AND WIFE—COMMUNITY PROPERTY—EQUITABLE INTEREST—ESTOPPEL—EXECUTION SALE—PRESUMPTION AS TO DEBTS.

Where a husband and wife mutually agree that property acquired by each shall be treated as separate property, and the husband acquires an equitable title to real estate which he transfers to a *bona fide* purchaser who has knowledge of such agreement, both the wife and the community are estopped from asserting any community interest in the land.

Every debt created by the husband during the existence of marriage is, *prima facie*, a community debt; and a sale of land on execution on a judgment rendered for such debt will divest the title of the community to the land.

Where the husband does not acquire other than an equitable interest in land, the community, or the wife as a member thereof, obtains no such interest therein as can be asserted against one having superior equities.

An equitable interest in land can be sold on execution under the statutes of this state.

Appeal from Superior Court, King County.

Preston, Albertson & Donworth, for appellants John Leary and Jacob Furth; *Bausman, Kelleher & Emory*, for appellant Leary-Collins Land Company.

6	17
9	457
9	498
32*	1070
37*	673
37*	679
6	17
13	695
6	17
223	391
6	17
31	305
81	457

Blaine & De Vries, for respondent William M. Calhoun;
James Kiefer, for respondent McGraw.

The opinion of the court was delivered by

HORT, J.—In January, 1884, M. V. B. Stacy, John Leary and A. Mackintosh desired to jointly purchase the land the title to which is in controversy in this action. The first named had the money with which to make the purchase, and was willing to make it on the joint account of the three. It was therefore agreed between them that the purchase should be made, and the entire consideration paid by said Stacy. Under this arrangement the property was purchased by said Stacy, and the legal title thereto placed in said Mackintosh, and a memorandum made between them by which it was agreed that each of said parties should have a one-third interest in the same, the said Leary and Mackintosh each to pay said Stacy the sum of \$2,666.67 within six months, with interest thereon from the date of the agreement at one per cent. per month. Upon such payment by said Leary and Mackintosh, each of the parties was to be entitled to a deed of an undivided one-third interest in the property. While the legal title yet remained in said Mackintosh, the said Leary paid his share of the purchase price. The said Mackintosh never paid for his share, and at this time disclaims all interest growing out of said agreement; and, so far as his equitable interest is concerned, it can cut no figure in the case, as upon such disclaimer by him his interest therein, if he ever had any, was in equity vested in said Stacy. The said Mackintosh, as the holder of the legal title, issued to said Stacy a certificate showing that he was the owner of an undivided one-third interest in the land. Soon after such certificate was issued, Stacy, for a valuable consideration, assigned and transferred it and his interest thereunder to one Mathias, who, by like assignment, and also by quit-

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claim deed, conveyed said interest to Fred E. Sander, who thereafter received a deed from Mackintosh, the holder of the legal title, conveying to him the same interest. Sander and wife then conveyed to William M. Calhoun, the plaintiff in this action. After the payment of his share of the purchase price by Leary, and long after the time when the interest of said Mackintosh should have been paid for under the terms of said agreement, the property was levied upon and sold under an execution issued upon a judgment in favor of one George D. Hill, and against said Stacy and Leary, at which sale the property was bid in by said George D. Hill, who thereafter received a sheriff's deed therefor. The title, if any, thus acquired by said Hill was afterwards conveyed to and vested in the respondent John H. McGraw. Such title was questioned by certain parties, who instituted a suit in equity relating thereto, and such proceedings were had that the matter was finally compromised by the payment of the claim of those attempting to assert equities as against said title by said McGraw in the interest of the title derived from said Hill. Before the interest of said Hill was purchased by said McGraw, he had, in the interest of the several claimants, been vested with the legal title to an undivided two-thirds interest in said land as the trustee for said claimants. At this time, and before said purchase by said McGraw, negotiations were had between him and said Leary, by which it was arranged between them that the title derived by said Hill under said execution sale should be purchased by said McGraw in the interest of himself and the said Leary. This arrangement was carried out, and the title of said Hill purchased by said McGraw, and the sum of \$8,000 paid therefor. In further pursuance of the arrangement between said Leary and McGraw, the interest of those attempting to assert equities as against the Hill title was purchased in their interest by said McGraw, and the sum

of \$4,000 paid therefor. It was understood between said McGraw and Leary that they each had an equal interest in these transactions. It was understood between them that the entire interest held by both of them was a two-thirds interest in the property in question. At the request of said Leary, and in pursuance of this understanding, the said McGraw conveyed to one Jacob Furth, as trustee for said Leary, an undivided one-third interest in said property. During all this time the said M. V. B. Stacy and said John Leary were married men, living with their wives in the city of Seattle, where the property was situated. Some time after the transactions hereinbefore set out, the said Stacy and his wife conveyed their interest in the entire property to John Collins, and he, his wife joining him, conveyed the same to the Leary-Collins Land Company, one of the appellants here. At the time these last conveyances were made it is clear that the grantees in such conveyances had full knowledge of all the facts above set forth. They also had full knowledge of the fact that there was an oral agreement existing between the said Stacy and his wife that each of them should have the sole management of their own property, and that all property acquired by either of the spouses before or during marriage should, as between them, be the property of the spouse thus acquiring.

Under this state of facts the question presented is as to the respective interests in said property of the parties to the action. The appellant the Leary-Collins Land Company claims that it is the owner of the entire title, for the reason that the land, when acquired by said Stacy, became at once community property and could only be conveyed by the joint action of the two spouses. We are unable to agree with this contention for the reason that the legal title was never vested in said Stacy, either as separate or community property. All that he had was an interest, the

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right to which he could assert in a court of equity. If that was all the title that he had, it was all that the community could have. It would follow that neither the community as a whole nor the spouse who had taken no part in the transactions could assert any right to the land which it would not be equitable thus to assert. Now, whatever the effect of this oral agreement between said Stacy and his wife might have had upon property acquired after marriage, where the legal title had been conveyed, it is clear that in a court of equity neither of the spouses could assert any right to property thus acquired in the hands of a purchaser for value, who had obtained it solely from the other spouse. We know of no reason why the members of a community as a whole or separately should not be bound by the same rules of good conscience as those not occupying such a relation; and, as an individual who held another out to the world as having full authority to deal with and make title to any property, real or personal, would be estopped from attacking the title thus conveyed in the hands of a purchaser for value, we see no reason why a member of the community should not upon the same principle be estopped from asserting rights to a title conveyed by the other whom she had, not only at the time of the conveyance, but for a long time both before and after it, held out to the world as being entitled to thus deal with the property. Besides, even if the interest which said Stacy acquired in the property should be held to have been a community interest, we think that such interest would have been divested by the sale on execution. It is clear that such would have been the effect of the sale had it appeared that the debt for which the judgment was rendered was a community debt. But it is claimed that in the absence of any showing of this kind it will be presumed that it was the separate debt of the spouse against whom the judgment was rendered. In our opinion, every debt created by the husband during the ex-

istence of the marriage is *prima facie* a community debt. All the property acquired by him is *prima facie* community property, and we think that justice and good conscience demand that the other presumption should also prevail. In the absence of any proof as to the nature of the debt this presumption obtained, and, for the purposes of this case, the debt upon which this judgment was rendered must be held to have been a community debt, and for that reason the entire property of the community divested by the sale made thereunder; and, as this appellant is charged with full notice, it can assert no right which the community could not have asserted if it had not conveyed. It follows that it has no interest whatever in the property.

The appellants Leary and Furth who, for all practical purposes, may be considered as Leary alone, as Furth has only been made a party by reason of the fact that Leary's title is held by him as trustee, do not assert anything as against the title of the respondent William M. Calhoun. Their contention is that they are entitled to the remaining two-thirds interest in the property, and that the respondent John H. McGraw is entitled to no interest whatever. It is claimed by them that the one-third interest which Leary obtained by reason of the original arrangement at the time of the purchase of the property has never been divested, and that by reason of the conveyance from McGraw they obtained another one-third interest. In our opinion, this contention cannot be sustained, for two reasons: *First*, Because the original interest of Leary in the property was divested by the sale on execution; *second*, whether or not his interest was in fact conveyed by the execution sale, it clearly appears from the proofs that this was a question taken into consideration at the time of the arrangement for the purchase of the Hill interest by said McGraw in the interest of himself and said Leary, and it was at that time understood between them that upon such purchase said

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Leary's original one-third interest, together with the other one-third which it was supposed Hill had title to, would pass to said McGraw for their joint benefit. Under this state of facts equity and good conscience will not allow either to assert as against the other an adverse title to said two-thirds interest, or any part thereof; and, as said Leary did not at any time have the legal title to any interest in said property, it follows that the community, or the wife as a member thereof, obtained no such interest therein as could be asserted against one having superior equities.

In what we have said we have not overlooked the point made in the interest of the appellant the Leary-Collins Land Company that an equitable interest in land could not be sold on execution. In our opinion, our statute settles this question adversely to such contention.

The decree of the court below properly adjudicated the title as between the several parties to the action, and must, therefore, be affirmed. .

STILES and ANDERS, JJ., concur.

DUNBAR, C. J., and SCOTT J., concur in the result.

[No. 875. Decided March 1, 1893.]

JOHN STEINER, *Petitioner*, v. GEORGE NERTON, *Respondent*.

HABEAS CORPUS—GROUNDS FOR WRIT—FORMER JEOPARDY.

The supreme court cannot, upon an application for *habeas corpus*, pass upon the question of former jeopardy of the petitioner, but such plea must be raised and tried in the lower court; nor can jurisdiction to determine such question be conferred upon the supreme court by stipulation accompanying the petition for *habeas corpus*.

Original Application for Habeas Corpus.

Metcalf & Metcalf, and *Dell Stuart*, for petitioner.

C. D. Bowles, and *A. L. Miller*, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—The petitioner was indicted and pleaded “not guilty.” A jury was empaneled, and the case went to trial. During the examination of the first witness for the state, on his examination in chief, and before the defendant was permitted to cross-examine him, and before any other witness had been introduced, offered, sworn or examined, the state moved the court to quash and dismiss the indictment and to permit it to file an information against the defendant, for the purpose of making what was deemed by the prosecuting attorney a material allegation in the information, which had been omitted in the indictment under which the state was then proceeding. The defendant, petitioner herein, opposed said motion. The court, however, sustained the motion, and the jury was discharged. Upon the filing of the information the court held the petitioner to bail in the sum of \$3,000, and ordered that in default thereof he be committed to the county jail.

The contention of the petitioner is that his restraint under said order is illegal because he had been put in jeopardy by the proceedings under the first indictment, and because under the law he cannot twice be put in jeopardy for the same offense. This court, however, cannot pass upon the question of the former jeopardy upon a petition for a writ of *habeas corpus*; and the legality of the proceedings under which he is restrained of his liberty is not called in question by the petition. The information is not assailed, and the subsequent proceedings seem to be regular. If the petitioner has been before in jeopardy for the same offense,

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that is a proper plea in bar, to be tried by the court, and, from the decision of which, an appeal would lie to this court. A stipulation accompanying the petition cannot confer jurisdiction on this court in a *habeas corpus* case.

The petition is, therefore, denied.

ANDERS, SCOTT, HOYT and STILES, JJ., concur.

[No. 726. Decided March 6, 1893.]

P. V. DWYER *et al.*, *Appellants*, v. A. F. SCHLUMPF *et al.*,
Respondents.

APPEAL—NOTICE BEFORE JUDGMENT AGAINST ALL DEFENDANTS.

Notice of appeal given before final judgment has been entered against all of the defendants appearing in an action is ineffectual.

Appeal from Superior Court, King County.

Burke, Shepard & Woods, for appellants.

Struve & McMicken, James Kiefer, Fishback & Hardin,
and *White & Munday*, for respondents.

The opinion of the court was delivered by

HOYT, J.—The record in this case shows that the notice of appeal was given before final judgment had been entered against all of the defendants who had appeared in the action. Founded upon this fact, respondents move the court to dismiss the appeal. The motion must be granted. If we consider the case as a single one as between the plaintiffs and all of the defendants, an appeal could not be taken until there had been a final disposition of the issues as to all the defendants who had appeared in the action. If treated as separate actions between the plaintiffs and each

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of the defendants, there should have been separate appeals. It follows that, however we construe the record, the appeal taken was ineffectual.

DUNBAR, C. J., and SCOTT, ANDERS and STILES, JJ.,
concur.

[No. 768. Decided March 6, 1893.]

W. D. SLOAN AND JOSEPH DEER, *Respondents*, v. CHARLES
LANGERT, P. DOLAN AND J. H. WILSON, *Appellants*.

ATTACHMENT—WRONGFUL LEVY—ACTION ON BOND—PARTIES—
EXEMPLARY DAMAGES—EVIDENCE—REBUTTING PRESUMPTION
OF MALICE.

In an action upon a bond for wrongful attachment of property of the obligees, recovery may be had in one suit for damages to both the joint and individual property of the obligees.

Under §295, Code Proc., exemplary damages may be recovered for malicious attachment. (*Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, distinguished.)

In order to rebut the presumption of malice in suing out a wrongful attachment, the defendant may testify that he believed the matters stated in the attachment affidavit to be true at the time of the issuance of the writ; and that he laid the matter fully before his counsel and acted upon the latter's advice.

The fact that an attachment was dissolved is merely *prima facie* evidence that it was rightfully dissolved, and does not preclude an investigation of that question in an action on the bond.

Appeal from Superior Court, Thurston County.

W. I. Agnew, and M. J. Gordon, for appellants.

Phil. Skillman, for respondents.

The opinion of the court was delivered by

DUNBAR, C. J.—Appellants sued out a writ of attachment against the property of the respondents, which was afterwards dissolved. This action was upon the bond for

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damages. The complaint alleges, in paragraph 5, that the sheriff levied upon certain property of Joseph Deer, one of the plaintiffs. The property attached consisted principally of liquors, cigars, bar and bar fixtures, tobacco, and other personal property contained in two saloons in the town of Tenino; also a certain lunch counter with its attachments. Paragraph 7 alleges that at the time of the attachment aforesaid, the said Deer was the owner and in possession of the two saloons and of the lunch counter referred to in paragraph 5, and that by reason of said attachment, and the retention of said property by the sheriff, his business was wholly interrupted for a certain length of time. Paragraph 12 alleges that, owing to the seizure of the property aforesaid by the sheriff, and the interruption of the business then being carried on by said plaintiff Deer, and of the depreciation in value of the property attached, and by reason of the damage done to their credit, standing and character as business men, and by reason of the fact that said writ was maliciously and oppressively sued out by said Langert, the plaintiffs suffered and sustained damage in a large sum, to wit, in the sum of fifteen hundred dollars.

Appellants moved the court to strike out said paragraphs five, seven and twelve, for the reason that the matters referred to in said paragraphs did not refer to, or relate to, any joint cause of action accruing to plaintiffs Sloan and Deer, but that they relate solely to Joseph Deer, one of the plaintiffs. The motion was overruled, and the action of the court in overruling the motion was one of the errors assigned here.

No authorities are cited by appellants in support of this proposition; but from our own investigation, and from the authorities cited by respondents, we do not think it can be sustained. Under the writ the joint property or individual property of either defendant could have been attached.

Suppose the joint property and individual property of both defendants had been attached; it cannot be contended that three suits on the bond would have been necessary to recover the damages engendered. The law does not favor a multiplicity of suits, and a remedy on a bond should not be more restricted than the operations of the writ. In *Boyd v. Martin*, 10 Ala. 700, it was held that upon a bond executed to several with condition to pay for such costs as they might sustain by reason of the wrongful suing out of the attachment, an action may be maintained though the attachment was levied on the separate property of each, in which they had not a joint interest, and the court in its argument said:

“How the damages are to be divided between the plaintiffs, is a matter with which the defendants have no concern as they will be protected by this recovery from another action, by both or either.”

See also: Wade on Attachment, § 297; Drake on Attachment, § 163; and *Summers v. Farish*, 10 Cal. 347. It is true that in *Alexander v. Jacoby*, 23 Ohio St. 358, it was held that an action on such undertaking may be prosecuted by those obligees who have an interest in the damages sought to be secured, without making other obligees, who have no interest in the action, parties thereto; but that case did not go so far as to hold that if they were made parties, damages to other obligees could not be respectively averred.

After the motion to strike was overruled, the defendants demurred to the complaint, for the reasons — (1) That it appeared upon the face of the complaint that there was a defect of parties plaintiff; and (2), that it did not state facts sufficient to constitute a cause of action. It is evident that there was no defect of parties plaintiff shown on the face of the complaint; but, construing it as a demurrer for a misjoinder of parties, which was the evident intention of

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the pleader, it was properly overruled, for it raises the same question which was raised upon the motion to strike, and the same principle governs the objections made by appellants to the testimony of the plaintiff Deer.

The court, among other instructions, gave the jury the following:

“Under our attachment law, with reference to these damage suits, there are two branches of damages—two classes; one is known as actual damages, and the other as exemplary damages; and if you further find from the evidence that such attachment was sued out maliciously by Mr. Langert, then these plaintiffs may recover, in addition to their actual damages sustained, if any has been sustained, such exemplary damages as in your judgment they are entitled to recover; that is, damages by way of punishment for having acted with malice.”

This instruction is alleged as error by the appellants under the ruling of this court in *Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45 (25 Pac. Rep. 1072). The court in that case did not undertake to decide that exemplary damages could not be recovered in cases where the statute specially provides for recovery of exemplary damages. Sec. 295, Code Proc., seems to put the right to recover exemplary damages in a suit on an attachment bond at rest, for it provides in so many words that, “if it be shown that such attachment was sued out maliciously, he may recover exemplary damages.”

Being entitled, then, to recover exemplary damages in case the attachment was sued out maliciously, the defendants should be allowed to introduce testimony tending to rebut the presumption of malice. In this case the defendant was not allowed to testify that he believed the matters stated in the attachment affidavit were true at the time of the issuance of the attachment. Considering the fact that a man is not liable to dispute facts to the truthfulness of which he has previously sworn, this would probably not have been the most convincing testimony in the world, but

it was competent testimony and the jury should have been allowed to weigh it.

Defendant Langert also offered to prove that before suing out the writ of attachment he made a full statement of his case to T. V. Eddy, his counsel, and upon such statement was advised by the said counsel that he had good grounds for attachment, and that he acted in good faith. The introduction of this testimony was also refused by the court. In this we think the court plainly committed prejudicial error. On this proposition the authorities are uniform and citations are, therefore, unnecessary. It is conceded by the respondents that the advice of the counsel would be competent testimony tending to rebut the presumption of malice, but it is urged that the fact of such advice having been given must be testified to by the counsel instead of the defendant. This position we think is untenable. If the giving of such advice is a fact competent to be proven in a case, like any other fact it can be proven by any one who has knowledge of it. It might not go to the jury with the same force from the defendant as it would from the counsel, but that would be the misfortune of the defendant and could not possibly be any reason for prohibiting him from testifying to the fact. As we have before said, the weight to be given to the testimony is a matter exclusively within the province of the jury.

The court also instructed the jury as follows:

“Your verdict must be for plaintiffs. The fact that the attachment was dissolved by the court entitles the plaintiff to nominal damages without any further evidence.”

This would be true if no evidence were offered on the other side; but we think the fact that the attachment was dissolved is only *prima facie* evidence that it was rightfully dissolved, and does not preclude an investigation of that question in an action on the bond.

For the errors mentioned, the judgment will be reversed.

STILES, HOYT, SCOTT and ANDERS, JJ., concur.

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[No. 699. Decided March 7, 1893.]

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ALLEN C. MASON, *Appellant*, v. ANNIE M. McLEAN
et al., *Respondents*.

WILLS—REVOCATION—DECREE—ERRORS NOT APPARENT ON
RECORD—ATTORNEY FEES.

A will devising all the testator's real estate to his wife, and which expressly declares that it is the last will and testament of the testator, cannot be construed as a codicil to a former will whereby all the real estate was devised to the wife, and certain sums bequeathed to the children, but such former will is necessarily revoked by the last one; and the last will not naming or providing for the children is inoperative as to them.

A decree vesting one-half of community property in the children of a testator remains unaffected by the setting aside of a decree rendered in the same cause upon proceedings in intervention declaring the rights of the parties to be as decreed in the original action, except that the interests of all parties should be subject to the lien of a certain mortgage.

The refusal of the court to grant a motion for a default for failure to answer within the prescribed time will be presumed to have been based upon a showing of good and sufficient cause therefor, in the absence of any showing to the contrary in the statement of facts.

In the absence of any showing or allegation in the statement of facts that the appointment of a guardian *ad litem* for certain children was made without any application therefor on their part, it will be presumed that the appointment was regularly made.

A judgment against plaintiff, on the dismissal of his action in ejectment, for \$125 attorney fees, on the ground that plaintiff knew at the time of instituting suit that certain of the defendants were infant children for whom it would be necessary for the court to appoint a guardian *ad litem*, is erroneous.

Appeal from Superior Court, Lewis County.

James Wickersham, for appellant.

J. H. Naylor (*M. Yoder*, guardian *ad litem*), for respondents.

The opinion of the court was delivered by

SCOTT, J.—On the 31st day of August, 1883, one James L. Holbrook made a will devising all of his real estate to his

wife, Charlotte E., and providing that each of his seven children, naming them, should have the sum of \$10. On the 7th day of July, 1883, he made a second will, in which he devised his real estate to his said wife and appointed her executrix without bond, and provided that the estate should be settled without the intervention of the probate court, except to admit the will to probate, and did not make any provision for his children therein, or name them in said last will.

After the decease of the testator, and on the 12th day of October, 1883, said second will was admitted to probate by the probate court of Lewis county in the then Territory of Washington, upon the petition of the said Charlotte E. Holbrook. Subsequently, on the 6th day of April, 1884, the first will was also admitted to probate in said court, upon a like petition, and upon the testimony of witnesses to the effect that the testator intended that the two wills should stand as one instrument, the last one as a codicil to the first, said instruments were thereafter treated as one will, whereby all the real estate was given to the wife of the deceased. It is admitted that all of such real estate was the community property of the said James L. and Charlotte E. Holbrook. Sometime after this, Mrs. Holbrook married a man by the name of Shaw, and on the 28th of December, 1885, she and her then husband made a mortgage to one Simmons, to secure a loan of \$2,500, obtained from him on said real estate, the appellant guaranteeing the payment of said loan. The mortgagors did not pay the loan in question. In March, 1887, five of the children of said testator began a suit against said Charlotte E. and her then husband, the two remaining children, and Simmons, the mortgagee, in the district court of Lewis county, claiming title as heirs of said James L. Holbrook, and seeking a decree declaring the children to be the owners of an undivided half of the land in question, and ask-

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ing that the mortgage made to Simmons be declared a lien only upon the other half owned by their mother. This suit was begun upon the theory that the acts of the probate court in admitting the wills to probate, and its proceedings thereon, were void.

On the 6th day of February, 1888, Mrs. Shaw entered into a stipulation with the children whereby it was agreed to place the real estate in the hands of a receiver to be appointed by the court, for the purpose of selling it at not less than \$6,000, and it was further agreed that this money should be divided, one-half to Mrs. Shaw and one-half to the children; but that the Simmons mortgage should be paid out of Mrs. Shaw's half. On the 10th day of February, 1888, the district court made a decree in conformity with the stipulation, and decreed the children to be the owners of an undivided half of the lands described, and appointed a receiver to sell the lands. No further action was had under the decree, the receiver appointed not qualifying.

On September 6, 1888, Mrs. Shaw, who was then a widow again, made a quitclaim deed of all the lands in question to the appellant, who, on November 30, 1888, paid the Simmons mortgage and secured the discharge thereof. On the 30th day of January, 1889, the appellant filed in said district court a petition to intervene in said action, setting up his title and the Simmons mortgage, and alleging that the stipulation of February 6, 1888, entered into between the children and Mrs. Shaw, was fraudulent in character. He was allowed to intervene as the successor in interest of Simmons and of Mrs. Shaw. August 19, 1889, a decree was entered in this proceeding in intervention, whereby it was declared that the rights of the parties in the original action were as stated and declared in the decree entered on the 10th day of February, 1888, except that the interests of all of said parties were subject to the

lien of said Allen C. Mason, for the amount paid by him in procuring the satisfaction of the mortgage to Simmons.

On May 2, 1890, in pursuance of a petition filed by the plaintiffs in the original action—the children aforesaid—the decree upon the proceedings in intervention was found to have been wholly unauthorized and illegal, and it was vacated and set aside. Whereupon said children entered upon and took possession of the real estate, and this action was brought by the appellant in ejectment to oust them therefrom. A trial was had which resulted in a judgment in favor of the defendants, and plaintiff appealed to this court.

We are of the opinion that the second will could not be held to have been intended as a codicil to the first, under the circumstances. It was expressly declared in the instrument itself to be the last will and testament of the testator. The proof upon which the same was found to have been intended as a codicil was clearly incompetent. The children not having been named in the said will, under the previous holdings of this court, it was inoperative as to them; and upon the death of the testator one-half of the community lands vested in the children, the first will having been revoked by the subsequent one.

Furthermore, if the appellant wanted to insist that the lien of the Simmons mortgage covered the entire land, he should have sought to preserve his rights therein by a foreclosure thereof, and not by taking a deed to the premises and paying off the mortgage. This deed from Mrs. Shaw was taken after she had entered into the stipulation with the children, and after the decree rendered thereon in the suit instituted by the children, and appellant took his deed to said lands with full notice of all the rights of the parties therein.

It is contended by the appellant that the decree rendered upon his proceedings in intervention had the effect of set-

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ting aside and vacating the decree previously entered in the original action brought by the children, and that the action of the court in setting aside the decree rendered upon the proceedings in intervention did not have the effect of reviving the former decree, but left said action as though the same had never been determined in any way. It is further contended by the appellant that the defendants in this action were estopped from attacking the decree rendered in favor of the appellant in his proceedings in intervention, for the reason that the same was rendered upon the consent of all parties.

As to the first proposition, we do not think that the judgment had the effect of setting aside the decree previously rendered. In fact it purported to keep the same alive, except that the rights of the appellant, insofar as he had obtained any rights to said lands by the payment of the mortgage, were held paramount to those of all the parties; and when the proceedings in intervention were set aside, the effect thereof was to allow the original decree to stand as made. As to the second proposition, we find nothing in the record to justify the contention upon the part of the appellant that said decree was rendered in pursuance of an agreement by the parties to said action, sufficient to hold that they were estopped from attacking the same, even if such a defense were available in this action.

Error is alleged upon the refusal of the court to grant a motion made by the plaintiff for a default against the defendants, on the ground that they had failed to answer or plead within the time prescribed after service. This much appears by a transcript of the record showing the order of the court denying the motion for a default and the exception of the plaintiff thereto. The record is silent as to whether any showing was made upon which the court based its action in refusing to grant the motion. Sec. 413, Code Proc., provides that the court may in its discretion set aside

any default upon an affidavit showing good and sufficient cause therefor. We cannot presume, under the circumstances, that the court arbitrarily refused to grant the plaintiff's motion for a default, without any showing by the defendants as to why the same should be refused. Doubtless the same reasons which would authorize a court to set aside a default would justify it, if then made to appear, in refusing to grant the default in the first instance, and the presumption must be in this case that the action of the court in the premises was warranted by a showing made at the time. Were the fact otherwise, it would be necessary for the appellant in settling a statement of facts to incorporate the proceedings of the court in this particular in the statement, with an allegation that said ruling was made without any showing by the defendants as to why the motion should not be granted. But the statement of facts does not contain this nor any allegation with reference thereto.

Error is alleged as to the appointment of a guardian *ad litem* for the minor children. The appellant alleges in his brief that such guardian was appointed by the court upon its own motion, without any application or consent therefor by the children, and the appellant alleges that as some of said children were over fourteen years of age, the court could not assume to act arbitrarily in the premises. This point is made to appear in the record in the same way as the preceding one, and there is no showing or allegation in the statement of facts which was settled, that a request for such appointment or petition therefor was not made by the children, and consequently it will be presumed that the appointment was regularly made.

Error is alleged as to the action of the court in allowing the defendants an attorney fee of \$125 against the appellant. Certain findings of fact were made by the court in this case, wherein it was found that, by virtue of the decree

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made as aforesaid on the 10th day of February, 1888, in the former action, the children were the owners of an undivided half of all of said real estate, and that said parties, including Simmons, were all regularly before the court, and that the mortgage executed to Simmons was a lien only upon the half of said estate which went to the wife; and it was found that said decree of February 10th was still in full force and that the appellant in this action took nothing by virtue of the mortgage and the deed of said lands as against the half so found to be owned by the children; that the attempted probate of the paper writing purporting to be the first will of said Holbrook was absolutely null and void. It was ordered and adjudged that the action in ejectment be dismissed, and that, as the plaintiff in said suit had knowledge when he instituted it that part of the defendants were infant children in whose defense it became necessary for the court to appoint a guardian *ad litem* and attorney, it was ordered and adjudged that he should pay to said guardian and attorney the sum of \$125, together with all costs of suit. The judgment concludes with the following clause: "To which findings of fact and of law and the judgment and order of this court, the said Allen C. Mason, plaintiff, by his counsel, in open court, duly excepted, and the exception is noted and allowed." There was nothing said in the findings of fact with reference to this sum allowed the guardian *ad litem*, he being the attorney also for such minor children. We do not think it can be held that the exception in this instance specifically called the court's attention to the error in allowing said attorney's fee. We are clearly of the opinion that the court had no right to render any judgment therefor. No motion to modify the judgment was made; and, for aught we know, this particular matter was never called to the attention of the court in any way, unless it can be held that the court's attention was called thereto by the exception taken as afore-

said. This exception is general in its nature, and specifies no grounds wherein said judgment is erroneous. The first appearance of any special objection to the so called attorney's fee is contained in appellant's brief in this court. Under the circumstances, as the action of the court was clearly erroneous in rendering judgment for said attorney's fee, it will be stricken from its judgment, and the same modified to such extent. But the appellant should not recover the costs of this appeal.

It might be well to add that were the appellant to recover costs in this court, none would be allowed for the transcript, owing to the imperfect condition in which we find the same. No index is annexed thereto, as required by the rules of the court, although it purports to contain an index which, however, is very defective and insufficient. It has been of no benefit whatever in assisting the court to go through and investigate the voluminous record. Furthermore, nearly all of the proceedings in all of said matters are set forth three times in the record. This includes all the pleadings, with the various orders of the court thereon, and the documentary evidence introduced, and has resulted in bringing up a voluminous record, two-thirds of which is entirely unnecessary and has only served to embarrass the court in its investigation of the cause. Had the same been called to the attention of the court prior to the argument, no hearing would have been permitted thereon in its then imperfect state, and appellant most likely would only have been permitted to correct the same on terms.

Judgment affirmed, except as to the attorney's fee of \$125 aforesaid, which is disallowed and stricken out.

DUNBAR, C. J., and ANDERS and STILES, JJ., concur.

HOYT, J., concurs in the result.

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Argument of Counsel.

[No. 716. Decided March 7, 1898.]

COKE EWING, *Assignee in Insolvency, Appellant*, v. F. D.
VAN WAGENEN *et al.*, *Respondents*.

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INSOLVENCY—EFFECT OF REPEAL PENDING PROCEEDINGS—COMMUNITY PROPERTY—FRAUDULENT CONVEYANCE—PLEADING—APPEAL.

Where proceedings in insolvency were begun under the provisions of the Code of 1881, and a receiver appointed to take charge of the insolvent estate for the benefit of creditors, the repeal of the Code provisions by the act of March 6, 1890, while the proceedings were pending, will not affect the title of an assignee appointed in such insolvency proceedings subsequent to the repeal.

The fraudulent conveyance by a husband to his wife of community property is not a transfer by one joint debtor to another.

A plaintiff is not called upon to reply to an affirmative defense while his demurrer to a special defense remains undetermined.

A statement of facts is not required on appeal in an equity cause where the whole case has been determined upon the pleadings.

Where bond for stay of proceedings has been given it covers the costs on appeal, and no further bond for such costs is necessary.

Appeal from Superior Court, Pierce County.

W. H. Pritchard, and *E. T. Dunning*, for appellant.

Crowley & Sullivan, and *William H. Reid*, for respondents:

The court did not err in dismissing the bill for the reason that it did not state facts sufficient to constitute a cause of action. The complaint alleges partnership between Van Wagenen, Sackett and Page under the name of the Buckley Lumber and Shingle Manufacturing Company, and that they transferred certain pieces of real estate to their respective wives, with intent to defraud creditors, such real estate being community property. The transfer of property from one joint debtor to another joint debtor does not constitute such a fraud as will justify an interference by a

court of equity. *McPhee v. O'Rourke*, 10 Col. 301. The property not being subject to execution and sale because of its community character, there certainly could be no fraud in making a transfer of it. The intent to defraud would not make the property liable for debts, unless it was liable to be subjected to sale upon execution at the time the transfers were alleged to have been made. *Brotton v. Langert*, 1 Wash. 73; *Littell & Smythe Mfg. Co. v. Miller*, 3 Wash. 481; *Boggs v. Thompson*, 13 Neb. 403; *Gillespie v. Brown*, 16 Neb. 457; *Smith v. Rumsey*, 33 Mich. 183 (and note); *Aultman v. Heiney*, 59 Iowa, 654.

There is a wide difference between an assignee and a receiver. In the case of an assignee, when appointed and qualified, the property of the debtor is transferred to him, and he becomes vested with title; on the other hand, a temporary receiver simply has a right to the possession of the property to preserve the same during the pendency of the proceeding, under the direction of the court, but has no title whatever to the property itself. *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 223; *Gaither v. Stockbridge*, 67 Md. 222; *Quincy, etc., R. R. Co. v. Humphreys*, 145 U. S. 82.

Up to the appointment of the assignee, the proceedings are preliminary. In other words, the action is commenced, but there is no divestiture of title, and nothing which gives any one except the assignor any interest in the property. Before the actual appointment of the assignee, in the present case, the law governing this matter was repealed, and this repeal took away, not any vested right, because none existed, but simply a remedy, which can always be done. *Gilmour v. Ewing*, 50 Fed. Rep. 656. It is a familiar principle that, wherever the jurisdiction exercised in proceedings depends wholly upon statute, and the statute is repealed, the jurisdiction is gone, and with it the whole proceeding, imperfect at the time of the repeal, falls to the

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ground, unless there be a reservation as to pending rights or causes. *Ex parte McCordle*, 7 Wall. 506; *Insurance Co. v. Ritchie*, 5 Wall. 541; *Norris v. Crocker*, 13 How. 429; *Illinois, etc., Canal v. City of Chicago*, 14 Ill. 334; *Lamb v. Schottler*, 54 Cal. 319; *Macnawhoc Plantation v. Thompson*, 36 Me. 365; *Gilleland v. Schuyler*, 9 Kan. 569; *North Canal Street Road*, 10 Watts, 351; *Hampton v. Commonwealth*, 19 Pa. St. 329; *Hunt v. Jennings*, 5 Blackf. 195; *Butler v. Palmer*, 1 Hill, 324; *James v. Dubois*, 16 N. J. Law, 285; *Springfield v. Commissioners*, 6 Pick. 501; *South Carolina v. Gaillard*, 101 U. S. 433; *Todd v. Laundry*, 5 Mart. (La.) 459; *Bailey v. Mason*, 4 Minn. 546; *Templeton v. Horne*, 82 Ill. 491; *Van Inwagen v. City of Chicago*, 61 Ill. 31; *State v. Brookover*, 22 W. Va. 214.

The opinion of the court was delivered by

STILES, J.—This appeal presents another phase of the same matter heretofore presented in *Traders' Bank v. Van Wagenen*, 2 Wash. 172 (26 Pac. Rep. 253). Appellant, as the assignee in insolvency of the individuals composing the firm known as the Buckley Lumber and Shingle Manufacturing Company, commenced his action against the insolvents, their respective wives and others who, it is alleged, are holding certain real estate conveyed by the insolvents in fraud of their creditors, to have the several conveyances set aside and the title cleared so that the property may be subjected to the payment of debts which would otherwise be unprovided for.

The allegation of the amended complaint is, that on the — day of April, 1891, Frederick Mottet was duly appointed assignee; that on the 6th of October, 1891, he resigned and his resignation was duly accepted by the court, and that on the same day the appellant was duly appointed as assignee in the place of Mr. Mottet. To this allegation each of the defendants answered as follows:

“That said insolvency proceedings referred to in the complaint were begun January 22, 1890, and said assignment was made on said date under the provisions of the laws of the State of Washington then in force; that this action is brought by plaintiff under color and pretense of authority of said insolvency proceedings, and since the making of said assignment, said laws of the State of Washington, under which said insolvency proceedings were instituted, have been repealed, and have become without force and effect.”

The plaintiff demurred to this separate defense in each answer, on the ground that it did not state facts sufficient to constitute a defense. The demurrers were overruled and, plaintiff electing to stand on his demurrers, the action was dismissed at his cost, and he appeals from the judgment thereupon entered.

Upon the face of these answers the only question which we are required to determine is whether the act of March 6, 1890 (Laws 1889-90, p. 83), entitled “An act to secure creditors a just division of the assets of debtors who convey to assignees for the benefit of creditors,” had the effect to put an end to all insolvency proceedings then pending in the courts of the state, where no assignee had been elected when the act took effect.

It is admitted by the respondents that, upon the appointment of an assignee under the insolvency law found in the Code of 1881, all the assigned property of the insolvent passed to such assignee and could not afterwards be divested by the legislature. Under such concession it would not be strictly necessary that we go further in this case, since between the time when the petition for insolvency was filed, January 22, 1890, and the time when the act of March 6th went into effect, almost five months, there was ample time for proceedings, under the code, through which an assignee might have been appointed. The fact that it is alleged that Mr. Mottet was appointed assignee in April,

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1891, would not justify this court in presuming that no other assignee was appointed before June 7, 1890, when the act of that year became operative.

There are several provisions of the Code of 1881 which would lead to a different *prima facie* conclusion. Sec. 2018 required the judge receiving a petition to make an order requiring all creditors to show cause, etc.; § 2021 directed that the clerk issue a notice calling the creditors together within thirty days from the date of publication of the notice; and § 2031 provided that if, on the day appointed for the meeting, creditors having been duly summoned did not attend or refused to appoint an assignee, it should be lawful for the judge to authorize the sheriff to accept the surrender of the property offered by the debtor, and perform in every respect the functions of the assignee. That these things had been done in case no assignee had been regularly appointed by the creditors, could be fairly presumed in favor of the demurrer to the answers in this case; but although such might be the condition of things, we cannot overlook the fact that neither party in this case has suggested that any such appointment was made.

The case has been presented here largely upon the assumption that a receiver had been appointed, perhaps under the provisions of § 2022, and that such receiver held the property until the time of Mottet's appointment in April, 1891. No such fact appears in the record in this case, but a glance at the case of *Traders' Bank v. Van Wageningen, supra*, shows that originally a receiver to take charge of the insolvent's estate was duly appointed, and it would seem, therefore, that we should not be discussing a purely imaginary state of things if we follow the briefs of counsel and assume it to be a fact that there was such a receiver.

The position assumed by the respondents is, that whatever might be the temporary orders in a case of insolvency, under the Code of 1881, until an assignee had been ap-

pointed no title to any part of his estate could be divested out of the debtor, for the reason that that statute contained no apt provision for the accomplishment of a divestiture except that found in section 2046, wherein it was declared that the property of an insolvent debtor should be fully vested in his assignee for the benefit of his creditors from and after the surrender of his property. The surrender, it is said, could not be accomplished until there was an assignee to whom the surrender could be made; and the receiver in such a case would be merely a temporary appointee to preserve the property from being wasted pending the appointment of an assignee; and the conclusion of their argument is, that notwithstanding the appointment of a receiver, there having been no assignee until long after the act of 1890 had gone into effect, repealing the insolvency sections of the Code of 1881, there could then be no further proceeding in the matter, and the whole attempt at an assignment would fail. There is much plausibility in these propositions, and if, upon a review of the whole statute, it is found that this property had not been placed in such a position that the court could exercise jurisdiction to appoint an assignee and proceed with the matter, the conclusion, however surprising and unfair it might be, would have to be accepted.

At the outset, so far as the two laws are concerned, we have recently held that the act of 1890 by implication repealed the code provisions on the subject of insolvent debtors. *Mansfield v. First National Bank*, 5 Wash. 665 (32 Pac. Rep. 789).

It is true, also, that wherever the jurisdiction exercised in proceedings depends wholly upon statute, which is repealed without any saving provision in the repealing act, the jurisdiction is gone and all pending proceedings go with it. *Endlich*, *Interp. Stat.*, § 479; *Sutherland*, *Stat. Const.*, § 165; *N. L. N. R. Co. v. B. & A. R. Co.*, 102 Mass.

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386; *Stephenson v. Doe*, 8 Blackf. 508; *People v. Livingston*, 6 Wend. 526.

There was no saving provision whatever in the act of 1890. All laws and parts of laws in conflict with the provisions of that act were repealed by one sweep without an apparent thought that the greatest confusion might follow. It is almost inconceivable that the legislature could have intended such results as are threatened in this case if the respondent's contention be sustained, for what will become of the estate actually reduced to the possession of the assignee? Must it be returned to the debtors, or will it become the subject of a scramble among their creditors through garnishments of the assignee? As we said in the *Traders' Bank* case, *supra*, the law of 1881, so far as the debtor was concerned, appeared to regard the matter of his discharge only, and was framed with a view to the immediate and final appropriation of his property to the payment of his debts from the time of his filing his petition, without much regard to formalities. Nothing contained in either the old or the new statute contemplates a rejection of the debtor's proffer of his property, and there is certainly nothing to show that a contingency might arise where any property in possession of the court or an assignee would have to be surrendered to him.

Sec. 2033, and the sections immediately following, provide for what shall be done in case any creditor, within ten days after the appointment of an assignee, deems it necessary to oppose "it," on the ground of some fraud committed by the debtor. If the fraud is established the debtor is deprived of the benefit of the law; if the allegations fail he is immediately discharged. But not a word is said about the assignee's turning over the property when fraud has been proven; on the contrary, § 2038 expressly provided that the judge might at once "approve the appointment," if he thought that waiting for the trial of the fraud issue

would cause the interest of the creditors to suffer. These are all awkward expressions; but we must make the best of them to the effect that the intent of the law may be enforced.

The view of this statute entertained by the territorial supreme court was forcibly expressed in *Lammon v. Giles*, 3 Wash. T. 117 (13 Pac. Rep. 417), to the effect that a proceeding under it partook more nearly of the nature of a suit in equity than of that of any other procedure known to the law, and that the courts must fall back upon their equity powers to enable them to make complete administration of it. But of what use would be any consideration of this kind if a technical want of acceptance and vesting of the title in an assignee were to be allowed to defeat the entire operation of the law upon a repeal of this kind?

It seems to us that our statute contemplated that by the filing of the petition in insolvency the estate of the debtor was brought into the court, there to remain as a trust fund for the benefit of creditors, whether the result should be a discharge of the debtor or not; and that a repeal of the law by another law regulating the same subject matter ought not to be taken as sufficient to deprive the court of all jurisdiction where the assignee had not been appointed June 7, 1890. The record now shows that there is an assignee, though it does not specify whether he was appointed under the formalities of the Code of 1881 or of the act of 1890. If the court had jurisdiction to appoint, the defendants have no right to shield themselves behind any irregularity in the manner of his appointment.

Returning to the matter of the receiver, however, we are well satisfied that in this particular case all question was removed by the appointment of that officer. Ordinarily a receiver is a mere officer of the court, who takes the custody of property for the benefit of the party ultimately proved to be entitled to it, and neither the title nor the

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right of possession is changed by his appointment. *Union Bank v. Kansas City Bank*, 136 U. S. 223 (10 Sup. Ct. Rep. 1013). But, under § 2022 (Code of 1881), the court was authorized, notwithstanding the stay of proceedings pending the notice to creditors, upon the sworn application of any creditor, to appoint a receiver to take possession of all property of the debtor *for the benefit of all his creditors*. There was here no question of holding for the party ultimately shown to be entitled to the property. The petition of the debtor conceded all the facts on his side, and the application of the debtor showed the emergency justifying the immediate sequestration of the property, and its devotion to the beneficiaries named, viz., the creditors. The order appointing a receiver was the creation of an equitable execution in favor of each creditor for his proportion of the proceeds of the estate, and the appointee, although nominally a receiver, was to every intent an assignee. No conveyance of property to either the assignee or the receiver was necessary under this statute, as in some statutes of similar character, as for example the national bankruptcy act of 1867 (*Hampton v. Rouse*, 22 Wall. 263), nor did the law require a decree of the court to divest the title out of the debtor, as have other laws, as *e. g.*, the national bankrupt act of 1841. *Oakey v. Bennett*, 11 How. 44.

By § 2024, when the creditors had agreed upon an assignee, and a statement of their deliberations had been filed in the clerk's office, the only thing the court did was to fix the assignee's bond. Some order would, of course, be natural and proper, but it was not prescribed and would be necessarily informal, perhaps a mere approval of the action of creditors. Sec. 2046 provided that from and after his surrender the property of the insolvent should be fully *vested* in his assignee; but it was not more fully vested in the assignee than the property of an insolvent corporation is vested in a receiver under chap. 13, Code of 1881.

It seems to us that titles do not come in question in such cases. The assignee or receiver, under the court's orders, can dispose of titles, but where they are in the meantime makes no difference.

In *Lammon v. Giles*, the court appointed a receiver on the petition of the debtor, and the whole estate seems to have been wound up under his administration, a proceeding approved by the supreme court. We see no reason why the same course might not have been followed with perfect legality in this case, if no regular assignee had been appointed. When the receiver was appointed, he took the estate absolutely for the creditors, not to hold until an assignee could be appointed; and the property and all rights which would have come to an assignee, if the usual course had been followed, immediately "vested" in him.

It must follow that this assignee could maintain this action, and that the repeal of the statute was insufficient as a defense.

The respondents object to the complaint on the ground that wherein it alleges the transfer of real estate from husband and wife, it shows a mere transfer from one joint debtor to another. This point is made upon the theory that the complaint is framed under the view that the wives of the partners were in some sense the business partners of their husbands, so that a transfer from husband to wife would be merely the conveyance from one joint debtor to another. It is, of course, a general rule that where property is transferred by one joint debtor to another, this does not constitute such a fraud as would justify the interference of a court of equity, because the property is still subject to execution, and the title to said property is not in any way clouded by the transfer. But we do not read the complaint in this respect as the respondents seem to. The wives in this case were not members of the partnership, nor is it alleged that they were. They are the persons to

whom the partners have conveyed the legal title to what is alleged to have been community property. Such a conveyance would be good as between husband and wife, so as to vest the entire title in the wife as a gift. Or it might be an actual purchase by the wife. But as against creditors, either a gift or a purchase made with an intent to defraud creditors would be void as to creditors. The wives are not alleged to be joint debtors, nor are they sued as such. The legal title is what the assignee seeks to bring into the estate. The deeds outstanding appear to place the title where it ought not to be, and his action is a proper proceeding to clear the title of the clouds raised by these deeds.

The point raised in behalf of the respondent, Allen J. Gilmour, that the appellant has not replied to his allegations of fact showing good faith on his part in connection with the transactions between himself and one of the other insolvents, and that therefore his answer is to be taken as true and constitutes a complete defense, is not well taken. One of appellant's demurrers was addressed to his special defense based upon the repeal of the insolvent act of 1881, and the cause now stands with that demurrer undetermined. The appellant has not yet been called upon to reply to the affirmative defense, since parties are not obliged to plead piecemeal.

The objection taken in this case, that no statement of facts appears in the record, is unavailable. The statute does not provide for or require a statement of facts in an equity cause where the whole case has been determined upon pleadings. So also the objection that no bond has been given for costs cannot be sustained. The bond for \$15,000 which was required by the court to stay proceedings covers the costs as well as the damages which the respondents might have recovered in case of appellant's failure to sustain his appeal. When the court is called

upon under Code Proc., § 1408, to fix the amount of bond for a stay of proceedings, the plain implication of the statute is that the bond shall cover all the damages which accrue by reason of the stay, including the costs of the appeal.

The judgment dismissing the complaint is reversed, and the cause remanded. The plaintiff's demurrer to the defense based upon the repeal of the insolvency law of 1881 will be sustained, and the cause will proceed in accordance with this opinion.

DUNBAR, C. J., and HOYT, ANDERS and SCOTT, JJ., concur.

[No. 721. Decided March 7, 1893.]

HENRY BINNIAN, *Respondent*, v. A. J. BAKER, *Appellant*.

CONVERSION OF MORTGAGED CHATTELS—ACTION BY MORTGAGEE.

A complaint by a mortgagee of chattels against a subsequent mortgagee for their conversion does not state facts sufficient to constitute a cause of action, when it contains no allegation of actual possession by plaintiff at the time of the alleged conversion, nor of his right to possession, nor of demand for possession.

Appeal from Superior Court, King County.

Battle & Shipley, and *White & Munday*, for appellant.

John Fairfield, and *Daniel T. Cross*, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—On August 23, 1890, one Taylor borrowed of Henry Binnian, respondent herein, the sum of \$335, for which he gave his promissory note, and to secure the payment of said sum executed and delivered to respondent a chattel mortgage on a certain lot of horses.

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Subsequently he mortgaged the same horses to A. J. Baker, appellant herein. Baker sold the horses in accordance with the terms of his mortgage, and bought them in at the sale. Binnian then brought his action against Baker to recover damages alleged to have been sustained by plaintiff through the alleged taking and converting to his own use by Baker of the property above mentioned. He did not allege the value of the horses, and did not allege demand for their possession, or that he was entitled to their possession; and he set forth the mortgage *in extenso*, under the provisions of which he was authorized to sell the property upon the violation by the mortgagor of any of the conditions of the contract, alleging the wrongful taking of the property by Baker, and that he wrongfully sold the same, to plaintiff's damage in the sum of five hundred dollars. The answer was a general denial.

Upon the trial the appellant objected to the introduction of any testimony on the ground that the complaint did not state a cause of action. The objection was overruled. Trial was had which resulted in a verdict for respondent for the sum of \$426. Judgment followed, and appellant appeals to this court, alleging many errors, but it will only be necessary to notice the first, viz.: That the court erred in not sustaining the objection to the admission of testimony on the ground that the complaint did not state facts sufficient.

This court held, in *Silsby v. Aldridge*, 1 Wash. 117 (28 Pac. Rep. 836), that a chattel mortgage under the statutes of this state does not convey to the holders of the mortgage any title to the property in question. The mortgage, then, being only a security, the mortgagee has no right in the property other than his right to foreclose. His lien has not been affected in any way by the sale of the property under the subsequent mortgage. All the interest that passed to Baker by virtue of his purchase of the horses

was the interest that Taylor had in the horses, which was simply the equity of redemption. Taylor was entitled to the possession of the property under the terms of the mortgage, and Baker as the purchaser of Taylor's interest became entitled to this possession, and the complaint contains no allegation of either actual possession at the time of the alleged conversion, nor of right of possession, nor of demand of possession. We think the allegations of the complaint entirely insufficient to maintain the action, and that the judgment must be reversed, and the case remanded to the lower court with instructions to dismiss the action.

SCOTT, STILES and HOYT, JJ., concur.

6	52
s10	650
32*	1012
32*	96
6	52
s18	369
s18	376
6	52
s30	366

[No. 752. Decided March 7, 1893.]

ALBERT W. RICHARDSON, *Appellant*, v. CARBON HILL COAL COMPANY, *Respondent*.

PRACTICE—AMENDMENT OF PLEADING—NON-SUIT—CONTRIBUTORY NEGLIGENCE—NEGLIGENCE—LIABILITY FOR PROVIDING UNSKILLFUL PHYSICIAN.

Where leave has been obtained to file an amended complaint to correspond with the proofs, it is error to direct a non-suit for insufficiency of the original complaint, if the proofs show a cause of action.

Where an employé of a coal company gets upon one end of the brake beam of the company's engine, in order to ride through a narrow and dark tunnel on the way to the office to get his pay, and is injured by a projecting rock in the tunnel striking his knee and throwing him to the ground, breaking his leg and dislocating his hip, he is guilty of contributory negligence although riding on the engine at the direction of a foreman, it not being customary for the men to ride upon the brake beam, and the company having provided another way to reach the office than that through the tunnel.

In an action against a company for injuries sustained in consequence of the negligent and unskillful treatment of the surgeon

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provided by the company, a non-suit is not warranted where the evidence shows that the company retained one dollar per month from the plaintiff's pay for hospital dues and a physician; that the company by the acts of its officers assumed to provide a physician to treat plaintiff, and that such physician was a negligent and unfit person, although there was no proof of any express contract relation existing between the company and plaintiff with reference to providing him a hospital and a physician, and he was in fact taken to the house of a relative instead of to the hospital. (HOTT and STILES, JJ., dissent.)

Appeal from Superior Court, Pierce County.

Pritchard, Stevens, Grosscup & Seymour, for appellant.
Judson & Sharpstein, for respondent.

The opinion of the court was delivered by

SCOTT, J.—The respondent, a corporation, was engaged in the business of mining coal, and transporting the same to shipping points. The appellant was employed by said company as a laborer, but did not have continuous employment. On the 15th day of April, 1890, while going to the company's office for his pay, not being at work upon said day, he, with several others, got upon a brake beam in front of an engine used to haul the coal cars for said company, to ride through a tunnel on his way to said office. There were no cars attached to the engine and no room for him elsewhere than on the brake beam. The room upon said brake beam was so occupied that appellant sat at one extreme outer edge, and in passing through the tunnel a projecting rock caught his knee, which must have been at that time outside of the line of the engine, and threw him to the ground with such force as to break one of his legs, and to dislocate it at the hip joint. He was treated by Dr. Garner, a physician in the employ of the company, and he brought an action for damages for injuries sustained in getting thrown from the engine, and also for negligent and unskillful treatment of his

injuries by said physician. At the conclusion of his testimony he asked and obtained leave from the court to file an amended complaint in accordance with the proofs introduced. Immediately thereafter, before the filing of said amended complaint, the defendant moved for a non-suit because the complaint did not state facts sufficient to constitute a cause of action, and because the proof was insufficient to support a recovery. The motion for a non-suit was granted, and plaintiff appealed.

Under the circumstances no question going to the sufficiency of the complaint can be considered, for the plaintiff had obtained leave to file an amended complaint to correspond with the proofs, and upon the motion for non-suit the cause should be treated as though a sufficient amended complaint had been filed. Consequently, if the proofs showed that the plaintiff had a cause of action, the court erred in directing a non-suit.

The plaintiff sought to recover upon two grounds. As to the first ground, relating to the liability of the defendant for the injuries sustained in getting thrown from the engine, we are satisfied that the ruling of the court was right, because the proof showed that the plaintiff was guilty of contributory negligence. To have reached the company's office it was not necessary for him to have gone through the tunnel, for another way had been provided by the company to go thereto. The proof showed that it was not customary for the employes of the company to ride upon this brake beam; that when they did carry men through the tunnel on the railroad, as they did occasionally, the men rode in the coal cars, and that the brake beam had been provided only for the brakemen. It was apparent from the very situation that a person occupying a place at the outer end of the brake beam crowded with men, as was this one, was in a dangerous position in going through a narrow and dark tunnel. At that time the engine was not

in the hands of the regular train men, but was being operated by other employés of the company, and the plaintiff knew this. He, with several others, was told by one of the company's foremen to get on and ride, and in response to this invitation he got upon the brake beam, with the result as aforesaid. The appellant must be held to have known that when he took the position on the brake beam, as he did, for the purpose of passing through the tunnel, there was considerable danger connected therewith, and he must be held to have assumed the apparent risk of the journey, under the circumstances. Consequently it is not necessary to determine whether the company would have been liable for the injury if the appellant's own negligence had not contributed thereto.

The proof is too uncertain and meager to determine what rights the plaintiff has under his second cause of action for additional injuries sustained in consequence of the neglect and unskillful treatment of him by Dr. Garner.

The proof shows that it was the custom of the company to retain one dollar per month from the pay of its employés, and there was testimony to show that the fund so created was for maintaining a hospital and employing a physician, for the purpose of caring for and treating employés of the company when they were in need of the same. There was no proof to show that said employés were only entitled to such treatment in case they were injured while in the performance of their duties as employés of the company. The proofs show that there was a building known as the company's hospital, and that Dr. Garner was the company's physician, and that he was employed by the company in accordance with such understanding to treat its employés. There was no proof of any express contract between the company and the appellant with reference to his right to medical and surgical treatment, other than that which arises from the circumstances proven. It appeared

that the company was operating several coal mines, and had several hundred men in its employ. There was nothing to show that the miners or laborers of the company other than its officers had any right to supervise the expenditure of this fund in any way, or any control of the hospital or the selection of a physician.

It does not appear whether this hospital was maintained by the company as a charitable institution, or whether it was for the purpose of deriving profit therefrom, and a determination of this question bears materially upon the plaintiff's rights in the premises. If said hospital was maintained as a charitable institution, and was not designed as a source of profit to the company, but was simply provided as a place in which its laborers might stay when sick or disabled for the purpose of being cared for, and the company simply further undertook to provide a physician for treating the men without expense to them, the whole being in the nature of a gratuity on the part of the company, it would only be liable for a failure to exercise due care in selecting a competent physician. Under such an arrangement the company could not be held to have agreed to treat the injured employé through the agency of a physician, but only agreed to procure for him the services of one, and he would not be the servant of the company.

If, on the other hand, the company was conducting a hospital with its own physician for the purpose of deriving profit therefrom, or if it contracted with the appellant to furnish him with the services of a competent physician, and to properly treat him in case of an injury, it would be liable for the negligence or want of skill of its physician in attending him. 1 Shear. & R., Neg., § 331; 9 Am. & Eng. Enc. of Law, p. 772, note, "Torts of Hospitals;" *Glavin v. Rhode Island Hospital*, 12 R. I. 411.

There was testimony to show that the appellant was very negligently and unskillfully treated by said Dr. Garner,

by reason whereof his injuries and sufferings were much aggravated, and which caused the injured leg to become much shorter than the other one, and much weaker than it otherwise would have been, and that such injuries were thereby rendered permanent in character. There was testimony to show that Garner was not a competent physician, in fact that he was grossly incompetent; that he was habitually very seriously under the influence of liquor, so as to render him unfit for duty, and was in this condition on several occasions when he called upon and treated the appellant.

There was no direct proof to show that the company had been negligent in selecting him as its physician, nor as to how or when he was selected, or how long he had been in the employ of the company, or how well he had been recommended, if at all; nor do we undertake to say what the company should do in employing a doctor towards ascertaining his competency and qualifications. That the company must, in any event, have exercised reasonable care in the selection of such a person is evident. It is also evident that the mere possession of a diploma or license to practice by a physician would not be sufficient evidence of his competency, for, having this, he might still be totally unfit to perform the services of a physician or surgeon.

Under the circumstances of this case we think the proof was sufficient to raise a presumption of negligence upon the part of the company in employing this physician, and, therefore, it was incumbent upon the company to rebut this presumption, and to show that it had exercised reasonable care in selecting him. The facts attending this matter are peculiarly within the knowledge of the company, and the burden of proof in this particular, under the circumstances, should be held to be upon it. 1 Shear. & R., Neg., §§ 58, 59.

It follows that whatever the contract may have been be-

tween the appellant and the company, and however it may have been conducting the hospital, and under whatever circumstances it may have employed or furnished the physician, the court erred in granting the non-suit, for regarding the case in its most favorable aspect for the company under the proofs offered, without any further explanation or rebuttal, the company would be liable for negligence in employing Garner if it is true that he was an unfit person for such a position.

Of course a greater liability would rest upon the company if it was conducting the hospital for the purpose of deriving a profit therefrom, or if it had contracted with the appellant to provide him suitable and skillful medical treatment.

It is contended by the respondent that there is no proof whatever of any contract relation existing between it and the appellant with reference to providing him a hospital or to provide a physician for him. But we do not agree with this. It appears, as before stated, that the company deducted regularly one dollar a month from the pay of each of its laborers, which was generally understood to be for the purposes stated. Furthermore, at the time the appellant was injured, one Mr. Lewis, who, as there was proof to show, was employed by the company as "general foreman of the mines," sent after Dr. Garner, the company's surgeon, to come and attend him. Some time thereafter, one Mr. Davies, who was the superintendent of the company, inquired why appellant was not brought to the company's hospital, he having been taken to the house of a relative at the time he was injured, and he was told that they preferred to keep him there so that his mother could better wait upon him.

It also appeared that at one time a brother of the appellant called upon Mr. Davies and complained of the way Garner was treating appellant, and told him they wanted

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another surgeon, and asked if the company would stand the expense of another surgeon, and Mr. Davies informed him that the company would not do so, but that they might get another doctor if they chose to, and the company would see that Dr. Garner was there. The appellant was never asked to pay for Garner's services. The company assumed to provide a physician to treat the appellant by the acts of its said officers.

It further appears that some time after the appellant was injured, a meeting of the miners was called for the purpose of appointing a committee to take charge of the hospital, and to supervise the expenditure of the fund raised by the assessment as aforesaid upon the laborers.

Under all the circumstances, we think there was sufficient proof to go to the jury as tending to establish the liability of the company upon one of said grounds for the additional injuries sustained by appellant in consequence of the neglect and unskillful treatment of him by said physician, and therefore the court erred in directing a non-suit.

The judgment is reversed and the cause remanded, with instructions to the lower court to designate a time within which the parties may file new pleadings, and to re-try the cause.

DUNBAR, C. J., and ANDERS, J., concur.

HOYT, J. (*dissenting*).—I agree with the majority of the court that the proofs failed to show any liability on the part of the company for the result of the accident by which the plaintiff was injured. But I am unable to agree with them that a *prima facie* case, showing any liability on the part of the respondent growing out of the attendance of Dr. Garner upon the appellant, was established by the proofs. There was absolutely no proof tending in the least degree to show any agreement or understanding between the respondent and the plaintiff that he should be

furnished with medical attendance when away from the hospital of the company. The most that the proof tended to show was, that by reason of the payment of certain hospital dues, it was understood that the employés should be entitled to the privileges of the hospital maintained by the company in the vicinity of its mine. It follows that there was no proof whatever tending to show that the company owed any duty to appellant to provide him medical attendance at the home of his friends, where he was taken for the reason, as alleged by them, that he could have better care there than at the hospital of the company.

Under these circumstances, the fact that the surgeon who happened to be called upon to attend the plaintiff was the same one who was employed by the company can, in my opinion, in no sense tend to show any liability of the company resulting from want of skill on the part of such surgeon in his treatment of the plaintiff. And even if we assume that such surgeon was requested to render the services by the company, the rule of liability would not be changed. If the company was under no obligation to furnish the services, the fact that it simply permitted the plaintiff to avail himself of the services of a person in their employ could not charge the company with liability. The attendance would still be at the instance of the plaintiff and not at all at the instance of the company. What they would do in such a case in a legal sense would be to waive their right to control the surgeon and allow him, at the instance of the plaintiff, to render the services.

The case is not presented in which the company should assume the absolute control of a person situated as the plaintiff was, and refuse to allow any other than its surgeon to attend upon him. In such a case the company itself could perhaps be said to have charge and might very well be held responsible for the result. But in this case there is not only an absence of proof tending to show any

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Syllabus.

such assumption on the part of the company, but there is direct testimony tending to show the fact that the company expressed an entire willingness that any other surgeon should be employed, but stated that it would not be responsible for his compensation.

In my view, the proofs present simply the case of one allowing his surgeon to render a favor for another person at his request. And to hold that by so doing he became responsible for any injury that might happen on account of the services thus rendered would, I think, establish a most dangerous doctrine, and tend much to repress the charitable instincts of the human race, which, under the most favorable circumstances, are not very free to manifest themselves. In my opinion, the judgment of the lower court should have been affirmed.

STILES, J., concurs.

[No. 588. Decided March 8, 1893.]

FRANK TURPIN *et al.*, Respondents, v. A. D. WHITNEY
et al., Appellants.

6	61
20	108
320	109

APPEAL—REFUSAL TO DISSOLVE ATTACHMENT—HARMLESS ERROR.

Error of the court in overruling a motion to dissolve an attachment, and in continuing by judgment the lien upon the goods attached, is harmless where the judgment in the main action is conceded to be right, and the goods attached would have been subject to execution upon such judgment. (STILES, J., dissents.)

Appeal from Superior Court, Thurston County.

Eddy, Gordon & Agnew, and James A. Haight, for appellants.

John C. Kleber, and Phil Skillman, for respondents.

The opinion of the court was delivered by

DUNBAR, C. J.— Respondents brought their action against appellants to recover \$400.72, on account of goods sold and delivered to appellants by respondents. On the same day the complaint was filed, the respondents filed an affidavit and bond upon which an attachment was issued out of the superior court of Thurston county against the property of appellants, and a levy was made thereunder. Appellants moved to dissolve the attachment, and affidavits and counter affidavits were filed in support of, and opposed to, said motion. Upon the hearing the motion was denied, to which ruling of the court the appellants excepted. No answer or other pleading was interposed to the complaint. In due course of time appellants' default was decreed and judgment was rendered according to the prayer of the complaint, and the lien of the levy under the writ of attachment proceedings was continued in said judgment upon the property covered by said levy and attachment.

The only error alleged here is the action of the court in overruling the motion to dissolve the attachment, and it is claimed that the judgment should simply be a judgment *in personam*. Inasmuch as the judgment in the main case is conceded to be right, it would be idle to reverse the judgment, even though we should conclude that the court erred in not sustaining the motion to dissolve the attachment, a question upon which we do not now pass. For the effect would have been the same, whether by the terms of the judgment the lien of the attachment proceeding was continued in the judgment or not, for if the judgment had simply been *in personam*, under the provisions of § 312, Code Proc., the sheriff would have satisfied the judgment out of the attached property. The matter appealed from

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here does not affect the merits of the action, and appellants must seek their remedy, if they have any, on the attachment bond.

The judgment is affirmed.

HOYT, SCOTT, and ANDERS, JJ., concur.

STILES, J. (*dissenting*).—I cannot concur in the judgment of the court. The constitution guarantees to every litigant the right to have all material questions involved in his case reviewed by this court, and both the statute and the decisions affirm that an appeal will lie only from a final judgment. Now in *Windt v. Banniza*, 2 Wash. 147 (26 Pac. Rep. 189), we held that an order refusing to dissolve an attachment was not a final order, so as to allow of its being appealed from separate from the main case, and this decision clinches the bonds of a wrongful attachment by refusing to entertain the error of the court in refusing to dissolve where there is no dispute that the debt was due. In nine cases out of ten where attachments are levied there is no dispute as to the debt, and therefore in an equal proportion of cases outrageous wrong may be perpetrated, as there was in this case, without any remedy, except upon a suit for damages. In my opinion so much of the judgment as continued the lien upon the attached property ought to have been vacated, and appellants should have had all costs upon the attachment and of this appeal.

6	64
9	609
33*	1061
38*	220
6	64
18	275
6	64
d38	280

[No. 760. Decided March 8, 1893.]

FIRST NATIONAL BANK OF ABERDEEN, *Appellant*, v. THE
COUNTY OF CHEHALIS, AND J. M. CARTER, *Treasurer*,
Respondents.

TAXATION—NATIONAL BANK SHARES—INJUNCTION.

The assessment of the capital stock of a national bank, made to the bank *in solido*, is valid.

The collection of the tax assessed upon the capital stock of a national bank will not be enjoined on the ground that the moneyed capital of such institutions is unjustly discriminated against, when the complaint does not show that, either by reason of the law or through the action of the assessors, some considerable moneyed capital, which is employed by individuals in the business of making profit by the use of their moneyed capital as money, is permitted to escape taxation. The non-taxation of "credits" is not ground for such injunction.

Appeal from Superior Court, Chehalis County.

Preston, Carr & Preston, James B. Howe, and M. J. Cochran, for appellant.

James A. Haight, for respondents.

The opinion of the court was delivered by

STILES, J.—The appellant bank complains that the county treasurer of Chehalis county is about to levy upon the property of the bank for taxes for the year 1891, which were assessed to the bank upon its capital stock in the sum of \$50,000. The complaint shows that, although its cashier delivered to the county assessor a list of its stockholders, giving their residence, together with a statement of the amount of the capital stock of the bank held by each of its stockholders on the 1st day of April, 1891, the assessor refused to assess the stock to the holders thereof, and assessed the whole of it to the corporation *in solido*. The tax was levied under the revenue act of 1891, and the

first point made by appellant is, that an assessment of the capital stock of a national bank, made to the bank *in solido*, is forbidden by the provisions of Rev. St. U. S., § 5219. It seems to us, however, that this contention must be resolved against the appellant, upon the authority of *National Bank v. Commonwealth*, 9 Wall. 353. Sec. 5219, Rev. St. U. S., is as follows:

“Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county or municipal taxes to the same extent, according to its value, as other real property is taxed.”

This section, so far as the point in issue goes, is, in substance, the same as the forty-first section of the act of congress establishing national banks. (13 St. at Large, 111). In the case cited, the State of Kentucky, many years before national banks were thought of, had the following provisions among its laws: *First*, That on bank stock or stock in any moneyed corporation of loan or discount there should be paid an annual tax of 50 cents on each share thereof equal to \$100, or on each \$100 of stock therein owned by individuals, corporations or societies. *Second*, The cashier of a bank and the treasurer of any other institution whose stock was taxed, should, on the 1st day of July in each year, pay into the treasury the amount of tax due. If such tax

were not paid, the cashier and his sureties should be liable for the same and 20 per cent. upon the amount, and the said bank or corporation should thereby forfeit the privileges of its charter. 2 Rev. St. Ky., 1860, pp. 239, 266. Under these provisions it was held, in the case above cited, that the bank was subject to an action for the amount of the tax assessed upon the stock, the theory being that the state had the right to resort to the bank as a garnishee for the collection of its claims against the stockholders for taxes which it might otherwise be unable to collect by any means within its power. That case is unreversed, and must be taken to be conclusive authority upon the argument of the question before us. *First National Bank v. Fisher*, 45 Kan. 726 (26 Pac. Rep. 482), and *Miller v. First National Bank*, 46 Ohio St. 424 (21 N. E. Rep. 860), are late cases, where, from a superficial reading of the opinions, it might be gathered that a different holding had been adopted in the supreme courts of Kansas and Ohio, but a closer reading shows that in both of those states the statute expressly provides for the assessment of the shares of stock to the owner, and contains no provision regarding payment of the tax by the bank itself. Secs. 21 and 23 of our revenue law of 1891 contain substantially the same provisions as the Kentucky statute above quoted, in so far as the assessment and collection are concerned (*Paul v. McGraw*, 3 Wash. 296, 28 Pac. Rep. 532), and upon the first point, therefore, the decision must be against the appellant.

The further, and perhaps the principal, ground of appellant's action is found in the following paragraphs of its complaint:

"13. That on the 1st day of April, 1891, there existed in the county of Chehalis, State of Washington, taxable moneyed capital (other than and beyond that invested in shares of stock of national banks and banking business)

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owned by citizens of said state, resident in said county, and there invested in loans and securities, to them payable and owing by other citizens of said state residing in said county, of vast amount, to wit, exceeding the sum of two hundred and thirty-seven thousand four hundred dollars.

“14. That on said 1st day of April, 1891, there existed in the State of Washington, in counties other than the county of Chehalis, aforesaid, other taxable capital in money and moneyed capital (aside from the moneyed capital referred to in the paragraph immediately preceding, and aside from the capital invested in banks and banking business), owned by citizens of the State of Washington, resident in said state (in counties other than the county of Chehalis), and there invested in loans and securities to them payable and owing by other resident citizens of said state, in counties other than the county of Chehalis, of vast amount, to wit, exceeding the sum, as complainant is informed and believes, of fourteen million dollars.

“15. That on the said 1st day of April, 1891, the total capitalization of national banks located in the State of Washington was the sum of seven million dollars; that the total capitalization of banks there located, but incorporated under the laws of the State of Washington, was the sum of four million dollars; and that at the same time large amounts of moneyed capital were invested in the State of Washington by residents of said state, in the stocks and bonds of insurance, wharf and gas companies; and, in addition to the foregoing, there then existed in said state other moneyed capital amounting to at least twenty-six million dollars, being the other moneyed capital hereinbefore referred to; that in no case, as complainant is informed and believes, and so charges the fact to be, is the stock of any national bank, or the shares of the stock of any national bank located in the State of Washington, valued for assessment for taxation in said state at a less sum or assessed upon a valuation of less than eighty-five per cent. of the par value thereof; and, further, that the total assessment and total valuation in the assessment for taxation, throughout the State of Washington for the year 1891, of and upon the bonds and shares of banks, banking corporations, insurance, gas, wharf and other corporations, was

the sum of eight million two hundred and five thousand five hundred and three dollars.

“16. That the facts alleged in the preceding paragraphs hereof, numbered 13, 14 and 15, were then, and during all of the times intervening between the 1st day of April, 1891, and the time of the return of the several assessment rolls throughout the State of Washington by the county assessors to the county auditors, well known to the assessor of the county of Chehalis, and all other county assessors throughout the State of Washington, and during all of said times, and until the first day of March, 1892, were well known to the several county and state officers hereinbefore referred to, and also to the boards of equalization and boards of county commissioners and the auditor of each of the counties in said state, and since the 1st day of March, 1892, have been and now are well known to the defendant, the treasurer of Chehalis county.

“17. That on said 1st day of April, 1891, the entire capital, surplus and undivided profits of complainant were invested as follows, to wit, \$12,500 in bonds of the United States, and the remainder in loans to residents of the State of Washington, furniture and fixtures.

“18. That all of said other moneyed capital referred to in the foregoing paragraphs hereof, numbered 13 and 14, was purposely omitted from the assessment and from taxation whatsoever by each and every of the county assessors and other taxing officers throughout the State of Washington, and the same and the whole thereof has escaped taxation throughout the state of Washington.

“19. That the omission by the several county assessors and taxing officers of the several counties in said state to either assess or tax other moneyed property or capital last aforesaid, was made through, under and by reason and in pursuance of an agreement entered into prior to the 1st day of April, 1891, between the several county assessors of the several counties in said state, whereby it was agreed upon between them that such omission should be made by them and all of them; and said omission and agreement to omit was in pursuance of an opinion rendered by the attorney general of the State of Washington to the said several county assessors at their request, advising such omission,

the said attorney general being, by virtue of his office, required by the laws of the State of Washington to render such opinion upon the request of said assessors.

“20. That such omission necessarily operated as a discrimination in favor of other moneyed capital in the hands of individual citizens of said state, and against shares of stock of national banking corporations located within this state, including complainant, and necessarily resulted in the taxation of the shares of such national banks, including complainant, at a greater rate than other moneyed capital in the hands of the individual citizens of the said state, all of which was well known to and most wrongfully intended by said several county assessors and taxing officers, and all of which is in direct violation of and forbidden by the provisions of the Revised Statutes hereinabove specifically referred to.”

The substance of these allegations is: *First*, That there was taxable moneyed capital in Chehalis county, which escaped the assessment, amounting to \$237,400; *second*, that there was like unassessed moneyed capital in other portions of the state exceeding \$14,000,000; *third*, that the moneyed capital invested in banks, national and state, was \$11,000,000; *fourth*, that there was invested in the stocks and bonds of insurance, wharf and gas companies, and other moneyed institutions, moneyed capital amounting to at least \$26,000,000.

Standing by themselves, the allegations of paragraphs 13, 14 and 15 are not sufficiently definite to enable us to ascertain therefrom the character of the institutions in which the moneyed capital which is said to be unassessed, so that we might say from a reading of the allegations there contained that this, that or the other moneyed capital therein described was or was not assessable, or, if not assessed, that the failure to assess was a discrimination against the national banks; but it is said in the following sections that the facts stated were well known to the county assessors of the several counties in the state, and that their

failure to either assess or tax the omitted moneyed property or capital was the purposed action of the assessors, brought about by an agreement made between the several county assessors in the state, whereby it was agreed between them that such omission should be made by them, and all of them, and that their agreement was caused by an opinion rendered by the attorney general of the state, advising such omission. It might be expected, therefore, that a reference to the published opinions of the attorney general would afford some description of the property by him advised to be omitted from the assessment rolls. While it is outside of the record in this case, it is altogether probable that the opinion of the attorney general of February 5, 1891, addressed to Hon. T. M. Reed, state auditor (Op. Atty. Gen. 1891, p. 59), contains the advice referred to. The question answered by the attorney general was, "Are credits or mortgages taxable under the law of March 9, 1891?" and the answer is in the negative. Mortgages are easily enough understood, but when the term "credits" is used a much larger class of property is meant. In this opinion, however, the writer evidently refers to mere debts due from one person to another, and the example which he gives and refers to most frequently is a promissory note secured by a real or chattel mortgage, or solvent signers, and there was no reference to the credits of banks, bankers, brokers or stock jobbers, or bonds or stock other than bank stock, or shares of bank stock, or shares of banking, wharfage, gas, water or insurance companies. Accounts, promissory notes and mortgages constitute the subject matter of the opinion. If, therefore, the action of the assessors was based upon this decision of the law officer of the state, and went no further, the allegations of the complaint would certainly turn out to be unsupported. The requirement of the federal statute that the taxation of national banks was not to be at a greater rate than is as-

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sessed to other moneyed capital in the hands of individual citizens of such state, has received frequent attention by the supreme court of the United States, and its construction seems to be at last reasonably settled. The paramount question has been, what is moneyed capital, within the meaning of the statute? Every person who uses money in the prosecution of any business must necessarily be said to have a moneyed capital. But it is not every such capital that is within the terms of this statute. The purpose of congress in making the provision referred to, as defined by the supreme court of the United States, was merely that the moneyed capital invested in national banks should not be placed at a disadvantage as compared with moneyed capital in the hands of individual citizens of the state, and which is used for practically an identical purpose with that invested in the shares of national banks.

The latest case, in which the subject in discussion was treated with great elaboration, is that of *Mercantile Bank v. City of New York*, 121 U. S. 138 (7 Sup. Ct. Rep. 826), and from that case we quote the following as showing the view taken by the federal court as to what is to be understood by the term "other moneyed capital." The court said:

"The main purpose of congress in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of congress is to be read in the light of this policy. Applying this rule of construction, we are led, in the first place, to consider the meaning of the words 'other moneyed capital,' as used in the statute. Of course it includes shares in national banks; the use of the word 'other' requires that. If bank shares were not moneyed capital, the word 'other' in this connection would be without significance. But 'moneyed capi-

tal' does not mean all capital the value of which is measured in terms of money. In this sense, all kinds of real and personal property would be embraced by it, for they all have an estimated value as the subjects of sale. Neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations, are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of the corporation, but the property of the corporation which constitutes its invested capital may consist mainly of real and personal property, which, in the hands of individuals, no one would think of calling moneyed capital, and its business may not consist in any kind of dealing in money or commercial representatives of money. So far as the policy of the government in reference to national banks is concerned, it is indifferent how the states may choose to tax such corporations as those just mentioned, or the interest of individuals in them, or whether they should be taxed at all. Whether property interests in railroads, in manufacturing enterprises, in mining investments, and others of that description, are taxed or exempt from taxation, in the contemplation of the law, would have no effect upon the success of national banks. There is no reason, therefore, to suppose that congress intended, in respect to these matters, to interfere with the power and policy of the states. The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital.' Corporations and individuals carrying on these operations do come into competition with the business of national

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banks, and capital in the hands of individuals thus employed is what is intended to be described by the act of congress. That the words of the law must be so limited appears from another consideration: they do not embrace any moneyed capital in the sense just defined, except that in the hands of individual citizens. This excludes moneyed capital in the hands of corporations, although the business of some corporations may be such as to make the shares therein belonging to individuals moneyed capital in their hands, as in the case of banks. A railroad company, a mining company, an insurance company, or any other corporation of that description, may have a large part of its capital invested in securities payable in money, and so may be the owners of moneyed capital; but, as we have already seen, the shares of stock in such companies held by individuals are not moneyed capital. The terms of the act of congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property. . . . This definition of moneyed capital in the hands of individuals seems to us to be the idea of the law, and ample enough to embrace and secure its whole purpose and policy."

In *Palmer v. McMahon*, 133 U. S. 660 (10 Sup. Ct. Rep. 324), the court said:

"We have also held that . . . because a state statute does not provide for the taxation of shares in corporations other than banks, it does not follow that the tax on moneyed capital invested in bank shares is at a greater rate

than that of the moneyed capital of individual citizens invested in other corporations, nor are the shareholders in national banks discriminated against because the taxation of such other corporations is arrived at under a separate system;" citing *Mercantile Bank v. City of New York*, *supra*.

And in *Talbott v. Silver Bow Co.*, 139 U. S. 438 (11 Sup. Ct. Rep. 594), where the question was whether, because the capital stock of certain mining and other corporations in the Territory of Montana were not taxed, the shares of a national bank could be assessed to the owner thereof, the court quoted from its opinion in *Mercantile Bank v. City of New York*, as follows:

"The term 'moneyed capital,' as used in the Rev. Stat., § 5219, respecting state taxation of shares in national banks, embraces capital employed in national banks, and capital employed by individuals when the object of their business is the making of profit by the use of their moneyed capital as money—as in banking, as that business is defined in the opinion of the court."

The allegations of this complaint nowhere show that any moneyed capital of the character defined by the federal supreme court was omitted or intended to be omitted by the assessors; or, if the intention of the complaint be to recover any such existing cases, the allegations are so general and indefinite that they could not be made the basis of individual action. In order to make out a case for the interference of the courts it must appear that, either by reason of the law or through the action of the assessors, some considerable moneyed capital, which is employed by individuals in the business of making profit by the use of their moneyed capital as money, is permitted to escape taxation. The non-taxation of what are termed "credits," in the opinion of the attorney general alluded to, would not suffice.

Judgment affirmed.

DUNBAR, C. J., and HOYT, ANDERS and SCOTT, JJ., concur.

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[No. 660. Decided March 9, 1893.]

MIKE CHRISTENSEN, *Respondent*, v. UNION TRUNK LINE,
Appellant.

ELECTRIC RAILWAYS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—
WITNESS FEES.

6	75
30	402
6	75
37	501
6	75
441	353

Where a driver attempts to cross a track in front of a rapidly approaching electric car, knowing of its approach, and his team is struck and injured by the car, he cannot recover for the reason that his own negligence contributed to the injury.

In an action against an electric railway company for negligence it is irrelevant to prove that the motorman had run his car at a high rate of speed on other occasions.

In the absence of proof that a conductor is necessary for the safe management of an electric car, it is error to admit testimony showing that there was no conductor upon a car at the time of an accident.

Proof of the discharge of the motorman after an accident is immaterial in an action against the company for his alleged negligence.

A witness who attends a trial and testifies upon request, without the service of a subpoena upon him, is entitled to compensation.

Appeal from Superior Court, King County.

Smith & Littell, and Hawley & Prouty, for appellant.

Truett P. Dyer, for respondent.

The opinion of the court was delivered by

ANDERS, J.—On October 27, 1891, the appellant was the owner of an electric street car line, and was operating the same on South Fourteenth street, in the city of Seattle. Upon this street, which runs north and south, there is an elevation known as Beacon Hill, from the top of which the railway track descended towards the north on a grade of about ten per cent., according to the evidence. From the crest of the hill northward, that part of the street that was

usually traveled was on the east side of the street car track. Between Canal and Lane streets, however, or in that vicinity, there had been a washout on the east side of the track, and, while the city was repairing the damage, it had constructed a crossing over the railroad track to the west side of the track, and a plank road leading north down the track a distance of about one hundred and twenty feet, and then crossing back to the east side of the track. The first, or upper, crossing was about seven hundred feet from the brow of the hill. At the lower end of this temporary roadway, on the west side of the railway track, and close to the lower crossing, there was an excavation on that side of the street some four or five feet deep, so that teams could not be driven further north without crossing back to the east side of the railroad.

About nine o'clock in the forenoon of said October 27th, the respondent, who was a teamster and engaged in hauling cordwood from Beacon Hill, passed down on the east side of the street with a team of horses and a wagon loaded with wood, while one of appellant's cars was also going down the hill in the same direction (north), crossed over to the west side of the track, and thence continued down the temporary roadway to the lower crossing, when the hub of the hind wheel of his wagon was struck by the passing car. As the car passed on, the horse nearest thereto sprang forward with such force that he detached himself from the wagon by breaking the whiffletree and harness. The other horse was thrown down the embankment, and the loaded wagon fell upon him and so injured him that he soon after died. The wagon was somewhat damaged, but whether by the collision or the fall is not certain, though the probabilities are that it was by the latter.

The respondent brought this action to recover damages thus sustained, and which he alleged were caused by the negligence of the appellant in thus running its car against

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his wagon. The appellant, by its answer, denied that it was in any manner negligent or careless in the management of its car, and alleged that whatever damage the respondent sustained was caused by his own carelessness and negligence. There was a verdict for the plaintiff, and defendant filed a motion for a new trial. The motion was denied by the court, and judgment was entered upon the verdict, to reverse which the defendant has brought the cause to this court.

It is contended on behalf of the appellant that the judgment must be reversed for the reason that the evidence shows that the injury complained of was not the result of negligence on the part of the motorman in charge of the car, but was caused solely by the want of ordinary prudence and care on the part of respondent. If it be true that the accident would not have occurred but for respondent's own negligence, he has no cause of complaint against appellant, even although the latter may have also been negligent. The fact, if it were a fact, that appellant was running its car at an unusually high rate of speed at the time of the accident, is no excuse for the want of a reasonable measure of care and prudence on the part of the respondent to avoid injury. *Railroad Co. v. Houston*, 95 U. S. 697.

The testimony is too voluminous to be stated fully, but a careful examination of it leads us irresistibly to the conclusion that the judgment cannot be sustained. The respondent's own testimony shows that he had for some time been engaged in hauling wood down South Fourteenth street from Beacon Hill, and was not only familiar with the character and condition of the street and the temporary roadway on the west side of the railroad track, but also with the running of the cars at that particular point. He says he had been over the road a great many times and knew there was danger in going on the temporary roadway if the cars were coming up. He further says that

while coming down the hill he met a car going up, and that he knew at that time that the car coming down and the car going up the hill usually met at the top of the hill. And yet he states that he did not look for the car until he got to the upper crossing, and did not see it until he was crossing over the track, and did not hear the bell ring until he got into the narrow space on the west side of the track. He also says that the car was then coming down at the rate, as he afterwards "figured out," of from sixteen to twenty miles an hour. He proceeded down the temporary passage way to the lower crossing and undertook to cross back to the east side of the track, in front of the approaching car, thinking he could do so "all right," but finding he had not time, he "swung his horses to the west." This movement of his team brought the back end of the wagon nearest the railway, and the dash-board of the car, in passing, struck the hub of the hind wheel, as before stated. The respondent testified further that the car was so near him when he turned his horses that it almost instantly came in contact with his wagon. The testimony of other witnesses also shows that the respondent attempted to cross the track ahead of the car, but apparently changed his mind and "pulled" his horses back and away from the railroad.

There is no doubt, therefore, as to what the respondent did at and immediately prior to the accident. And we think that it was his own want of that reasonable care and watchfulness which the occasion demanded, that brought about the injury of which he complains. In the first place, it was negligence on the part of respondent to cross from the east side of the track to the narrow passage on the west without looking for the approach of the car which he knew was about to pass down the hill, if, in fact, as he claims, it was a dangerous place. And it was still more negligent for him to undertake to cross back when the car was so

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near him. His excuse for so doing is that the way was too narrow for the car to pass his wagon, and that it was therefore the duty of the person in charge either to stop the car or go at such a rate of speed as would have permitted him to pass over the track to a place of safety.

It was undoubtedly the duty of the motorman in charge of the car to use all reasonable precautions to prevent injury to the respondent, but it was not negligence on his part not to anticipate that the respondent, who was traveling on the public highway, in the same direction, and by the side of the railway track, would suddenly undertake to cross the track in front of the car. He had a right to presume that the respondent would remain off the track and not knowingly place himself, or his property, in imminent danger. And he was not bound to regulate his speed at such a rate as would certainly avoid injury to any one who might attempt to cross the road in an unreasonable and improper manner. *Meyer v. Lindell Ry. Co.*, 6 Mo. App. 27.

The evidence as a whole clearly shows that the traveled way on the west side of the street was, at all points, of sufficient width to permit the cars to pass wagons or other ordinary vehicles that might be there, and that the lower crossing was the widest part thereof. This was shown by the testimony of the man who constructed it for the city, by measurements of respondent's wagon and the width of the plank on the day on which the accident occurred, and by actual tests on the same day. On that afternoon, Mr. Atwood, who was then driving up the street in a wagon of the same width of track as that of respondent, and with hubs but one inch shorter, stopped at the narrowest portion of the planking and got off his wagon as one of appellant's cars was passing, so as to be able to observe how close it would go to the wagon; and he testified that the car was not nearer than nine or ten inches from the wagon.

One other witness testified that he had driven along the same road when the street cars were passing up and down without difficulty. And both the motorman who was running the car when the accident happened and a former conductor testified that they had frequently passed teams at that place with the cars—the latter stating that he had seen the cars pass both lumber and wood wagons between the upper and lower crossings.

It will therefore be seen that if the respondent had stopped when he saw the car approaching the crossing, and waited, as the motorman says he thought he would do, until it had passed, no collision would have occurred and no damage would have been done. The discrepancy between the testimony of the respondent and some of his witnesses and that of the witnesses just mentioned as to the width of the road at the place of the accident, can be readily accounted for by the fact that the railway company, after the accident, moved the track some eighteen inches farther to the west, and that the distance from it to the sidewalk at the time of the trial was taken as the width of the traveled way at the time of the accident.

It is claimed by the learned counsel for the respondent, that notwithstanding the fact that the respondent may have been guilty of negligence in attempting to cross the track, the appellant was not justified in running him down. And we have no doubt of the correctness of that proposition. But we fail to find sufficient evidence in the record to warrant the conclusion that the motorman having the management of the car was derelict in the discharge of any duty he owed to the respondent. He rang the bell violently from the time he discovered the respondent on the east side of the track until he reached the lower crossing, and when he saw that the respondent was about to cross the track in front of him, and that he would be unable to stop the car in time to prevent a collision in case he did cross, he "hallooed"

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“look out” so loudly that he was heard by persons who were at a considerable distance down the street. There was a brake at each end of the car, and both of them were in good condition and firmly set. In short, as was said by one of the witnesses who was a passenger in the car at the time, he did everything he could do to stop the car and to prevent injury to the respondent. Indeed, it appears by undisputed testimony that the respondent himself stated soon after the collision occurred, that the motorman tried hard to stop the car and was not to blame for failing to do so. He then made no claim for damages on account of any mismanagement of the car, but did claim that the appellant was responsible for having, as he then supposed, built this narrow roadway and left open the excavation into which he fell at the lower end thereof. It was not until he learned that the city, if anybody, was responsible for the condition of the street, that he made any complaint as to the speed of the car.

The rights and duties of street railway companies, and persons using the streets of cities in the ordinary way, are very clearly and tersely defined in the late case of *Carson v. Federal St. & P. V. P. Ry. Co.*, 147 Pa. St. 219 (23 Atl. Rep. 369), in which the supreme court of Pennsylvania said:

“Greater and better facilities and a higher rate of speed are being constantly demanded. The movement of cars by cable or electricity along crowded streets is attended with danger, and renders a higher measure of care necessary, both on the part of the street railways and those using the streets in the ordinary manner. It is the duty of the railways to be watchful and attentive, and to use all reasonable precautions to give notice of their approach to crossings and places of danger. Its failure to exercise the care which the rate of speed and the condition of the street demand, is negligence. On the other hand, new appliances, rendered necessary by the advance in business and population in a given city, impose new duties on the public. The

street railway company has a right to the use of its track, subject to the right of crossing by the public at street intersections; and one approaching such a place of crossing must take notice of it, and exercise a reasonable measure of care to avoid contact with a moving car. It may not be necessary to stop on approaching such a crossing, for the rate of speed of the most rapid of these surface cars is ordinarily from six to nine miles per hour; but it is necessary to look before driving upon the track. If, by looking, the plaintiff could have seen and so avoided an approaching train, and this appears from his own evidence, he may be properly non-suited. . . . Orr testifies that he knew the crossing; that he listened for the sound of a gong, but, not hearing it, drove on the track and was instantly struck. He drove in front of a moving car so near to him as to make a collision inevitable. If he had looked he could have seen the car and stopped, and the accident would have been avoided. Not to do so was, in the language of *R. R. Co. v. Bell*, 'gross negligence,' and justly defeats the action brought to recover from another damages that were self-inflicted. It is the duty of one about to cross a street railway track to look, so that he may not walk directly in front of a moving car, to be struck by it."

In that case the plaintiff's employé, without stopping or listening, drove directly upon defendant's tracks and then looked up and saw the car so near to him that there was no escape. In the case at bar the plaintiff both saw and heard the approaching car and yet attempted to cross the track. His experiment failed and he alone must bear the consequences of his miscalculation.

In view of the fact that there must be a new trial of this cause, we will next consider some of the alleged errors in reference to the admission of testimony over the objections of appellant. It is contended that the court erred in permitting the plaintiff to show that this particular motor-man had run his car at a high rate of speed upon other occasions, and we think the court did err in so doing. It was a fact collateral and irrelevant to the issue, and one

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which the defendant could not be expected to be prepared to rebut without previous notice. 1 Greenl., Ev., § 52.

And, in view of the fact that there was no testimony showing that a conductor was requisite or necessary in order for the safe running and management of the car, we think it was error to admit testimony to show that there was no conductor upon this particular car at the time of the accident. If a conductor was necessary to the proper management of the car, that fact should have been shown, and if unnecessary, then the fact that there was none was immaterial, and should have been excluded from the jury.

We are also of the opinion that the court should not have permitted the respondent to show that the car driver was discharged by appellant soon after the accident occurred, but inasmuch as it was also shown that it was the rule of the company to discharge all motormen who met with accidents under any circumstances, we think the ruling was not sufficiently prejudicial to entitle the appellant to a reversal of the judgment on that ground.

There was no error in the court's refusing to grant, in its entirety, appellant's motion to re-tax the costs in this case. We are unable to see why a witness who attends a trial and testifies therein without the service of a subpoena upon him, is not justly entitled to compensation therefor; nor can we perceive "how any party can be injured in having to pay mileage and attendance merely for the witnesses of an adversary who attends upon request or agreement, when the additional expense of officer's fees and mileage for issuing and serving of a subpoena, swelling largely the claim for disbursements, could do no more than to procure the attendance of the witness." *Cranford v. Abraham*, 2 Or. 166. See also *Wheeler v. Lozee*, 12 How. Pr. 448; *Farmer v. Storer*, 11 Pick. 241.

It is not necessary to discuss the remaining objections of appellant, as they may not arise on another trial.

The judgment of the lower court is reversed, and the cause remanded for a new trial.

STILES, SCOTT and HOYT, JJ., concur.

DUNBAR, C. J. (*dissenting*).—I think the whole record in this case shows that the motorman was running his car in a reckless and unwarranted manner, and that the plaintiff was not guilty of any contributory negligence. The judgment should be affirmed.

[No. 763. Decided March 9, 1898.]

LAURA WOLFERMAN, *Administratrix of the estate of George C. Schneider, deceased, Respondent*, v. H. C. BELL, BELLE BELL AND BAUM & CO., *Appellants*.

NEGOTIABLE INSTRUMENTS—ALTERATION—RECOVERY.

The alteration of the time of payment of a promissory note after its execution, when there is no proof of fraud on the part of the payee or holder, will not prevent a recovery thereon after its maturity according to its original tenor.

Appeal from Superior Court, Spokane County.

Turner, Graves & McKinstry, for appellants.

Feighan, Wells & Herman, and *Patrick H. Winston*, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—It would be profitless in this case to undertake to review the authorities, for they are numerous and irreconcilable; some courts holding that an alteration of the face of a writing raises no presumption either way, but that the question is one for the jury. Other courts have held that the alteration raises the presumption that it was made before delivery; others that in such cases the

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33* 835
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8 592
8 688
32*1017
34* 930
35* 604
36* 443
36*1094
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12 146
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16 351

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presumption attaches that the change was made after delivery, and that it must be explained before it is received in evidence. Still others, that it raises such a presumption only when it is suspicious. While in California it is held that the change in the printed words of an instrument raises no presumption against the instrument, while a change in the written words does raise such presumption.

The rule that the alteration raises a presumption against the instrument cannot be indulged without conflicting with the general proposition that fraud is never presumed, and with another general proposition that the burden of proof is upon the party who pleads an affirmative defense. If it is put in issue by the pleadings, it is a fact in the case to be determined by the jury, subject to the same rule of presumption as any other fact to be proven in the case.

There is an abundance of authority to sustain this view, and we think it a reasonable one. As far as this particular case is concerned there is no testimony whatever tending to show fraud on the part of Schneider and those claiming under him. The testimony of Bell and his wife cannot be considered by this court. They were certainly testifying concerning a transaction had by them with the deceased man Schneider, and the testimony falls plainly within the inhibition in § 1646 of the Code. It matters not that the testimony was not objected to. It is objected to here. This court is trying the case *de novo*, and it must try it on legal testimony.

There was no testimony on the subject of the alteration. The notary simply swore that no change was made in the instrument in his office at the time it was delivered, but he did not pretend to testify that the instrument had not been altered before it was delivered. His testimony amounts to nothing. But the testimony is abundant that the interlineation is not in the handwriting of Schneider. An inspection of the original instrument does not lead us to the same conclusion that it does the attorneys for the appellants.

It is evident, we think, that the added words were not written at the same time that the note was written and signed by Bell, or with the same ink or pen. But it seems to us tolerably plain that they were written with the same ink that was used by Belle Bell when she signed the notes, and by Harry C. Bell and Belle Bell when they signed the mortgage; and with the same pen, which was evidently a heavier and duller pen than was used in writing the body of the notes; and that the added words and figures very closely resemble the handwriting of Bell as shown by the letters introduced in evidence. And outside of any extrinsic evidence on the subject, we should be inclined to come to the conclusion that the change was made when Mrs. Bell signed the notes and mortgage; and the letters from Bell to Schneider tend to strengthen us in that view. In such an event the judgment of the court is more favorable to the appellants than it should be, but it is not complained of here and will not therefore be disturbed.

But the appellants could not prevail here in any event. They admit the execution of the notes and mortgage, and for the consideration expressed. There is not a syllable of proof of fraud on the part of respondent. According to their own version of the transaction, the first note had become due long prior to the commencement of the suit. By the terms of the contract this matured the second note, and as a matter of fact it was matured by lapse of time without reference to default in payment of the first note, before the case was tried; so that the respondent obtained judgment for no more than he was entitled to, and there is no principle of equity which will justify this court in disturbing it.

The judgment is, therefore, affirmed.

HOYT, J., concurs.

ANDERS, STILES, and SCOTT, JJ., concur in the result upon the last ground stated.

[No. 657. Decided March 10, 1893.]

W. P. SAYWARD, H. G. MERCER AND NATHAN BUCKLIN,
Appellants, v. THOMAS NUNAN, ALEXANDER MAITLAND
AND W. J. WEEDIN, *Respondents*.

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32*1022
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39* 681

EXECUTION—TRIAL OF TITLE—PLEADING—EVIDENCE—JUDG-
MENT—BILL OF SALE—RECORD—CHATTEL MORTGAGE.

The failure to record a bill of sale within ten days after its execution, where the purchaser does not take possession of the property, renders it void only as to such parties as obtain intervening rights between the time of its execution and of its recording.

The holder of a chattel mortgage, who has not reduced the property to his possession, cannot maintain a proceeding as owner to recover possession thereof, when it has been levied upon as the property of another.

Where the proof creates a doubt as to whether an instrument effects a conditional sale of property or is a chattel mortgage thereof, the instrument should be treated as a chattel mortgage.

The trial of title to property levied upon, where it is claimed by a third party, is based upon the allegations of the affidavit setting up ownership, and, a complaint being unnecessary, it is not error to strike it from the files.

The act of a debtor in putting another in the constructive possession of his property under a bill of sale does not conclude his creditors from showing that the debtor himself was, and claimed to be, in possession.

Upon the trial of title to property levied upon under execution, the proper judgment against a claimant who fails to make good his title to the property is for the amount of the execution creditors' claim, not exceeding the value of the property in controversy, irrespective of any priority the claimant may be entitled to as against such creditor.

Proof of the condition and value of property before and after the date of a bill of sale thereof is inadmissible in the absence of proof that the condition and quantity of the property was the same at such times as it was when the bill of sale was executed.

Appeal from Superior Court, Island County.

Battle & Shipley, for appellants.

Lewis & Humphrey, for respondents.

The opinion of the court was delivered by

SCOTT, J.—The respondents Maitland and Weedon obtained a judgment against one W. H. Thayer. Executions were issued thereon to Thomas Nunan, sheriff of Island county, and were levied by him upon a certain quantity of logs in controversy in this action. The appellant, W. P. Sayward, claiming to be the owner of said logs and entitled to the possession thereof, instituted proceedings under §§ 491 to 495, inclusive, Code of Procedure, relating to claims by third persons to property levied upon. The appellants Mercer and Bucklin were his sureties upon the bond given in pursuance of said proceedings. A trial was had and judgment rendered in favor of the execution creditors, and the claimant and his said sureties appealed.

It is conceded that prior and up to April 7, 1891, said W. H. Thayer was the owner of certain property known as the Useless Bay Logging Camp, which included teams and a logging outfit; and that he had various contracts with parties thereabouts, permitting him to cut standing timber on their lands, respectively, and to remove the same, which were known as logging contracts. Appellant Sayward was and is the owner of the Port Madison Mills, and through one G. A. Meigs, his agent, had, prior to April 7, 1891, furnished Thayer with supplies which were used by him in the operation of said logging camp, and he claimed that Thayer was indebted to him therefor on said April 7th. Prior to this time Thayer had sold and delivered to Sayward a boom of logs, and on said April 7th, Thayer executed and delivered to Sayward a paper writing purporting to be an unconditional and absolute bill of sale, including and specifying all the property used in operating said logging camp, together with the various timber contracts aforesaid.

Prior to this time Thayer had given to one Holcombe a mortgage to secure the sum of \$1,400, owing by him to

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Holcombe, and interest thereon, which mortgage covered a part of the property belonging to said camp and included in said bill of sale, which was made subject to this mortgage. The bill of sale was not filed for record until the 21st day of April, 1891. The levies upon the logs in question were made in the month of October following, and the case turns on the effect which is to be given to this instrument. The appellants contend that said instrument is what it purports to be, an absolute bill of sale, while the respondents contend that it was understood to be, and is in effect, a mortgage only.

It is further contended by the respondents, if said instrument is to be regarded as a bill of sale, that in consequence of its not having been recorded within ten days after it was given, as is required by § 1454, Gen. Stat., it is absolutely void as to the existing or subsequent creditors, if the property, as is claimed, was not taken possession of by the vendee. This contention, however, is not well founded; the failure to record the bill of sale within ten days would only protect such parties as had obtained intervening rights after its execution and before the time it was filed for record. *Crippen v. Fletcher*, 56 Mich. 387 (23 N. W. Rep. 56). The respondents' rights under said execution levies did not accrue until some time after the instrument was recorded.

It is contended by the appellants that there was an actual transfer of the possession of said property to Sayward at the time the bill of sale was executed, and that said camp was thereafter conducted under the management of his agents. We are satisfied, however, from an examination of the proofs, that there was no change of possession in fact, especially such an open and notorious change of possession as is required in such a case. *Steele v. Benham*, 84 N. Y. 634; *Siedenbach v. Riley*, 111 N. Y. 560 (19 N. E. Rep. 275). It is claimed that the camp was in charge of

one Nickols, a brother-in-law of Thayer, by virtue of an instrument as follows:

“USELESS BAY, April 7, '91.

“I have this day bargained and agreed to take charge of the logging camp purchased of W. H. Thayer by W. P. Sayward, of Port Madison Mills, and manage the same to the best of my ability, at the rate of sixty-five dollars per month.
H. B. NICKOLS.”

Nickols' name to this instrument was signed at the time by Thayer, and the great preponderance of the proof is to the effect that Thayer continued the operation and management of the camp after the execution of the bill of sale practically in the same manner as it had been conducted by him before it was given. Orders were sent to him from the mill at various times for logs, and he purchased supplies from time to time of Sayward, who carried on a store in connection with his mill, said supplies being for the purpose of carrying on the camp and for supplying clothing and other articles to the men employed about said camp, and such articles were charged to Thayer individually. Of course the failure to take possession would not be a material matter if the bill of sale was in fact what it purported to be, an absolute transfer of the property, it having been recorded prior to the time the rights of the respondents accrued.

If said instrument is to be regarded as a chattel mortgage, the property not having been reduced to the possession of the mortgagee, he could not maintain this proceeding as owner to recover possession thereof under the holdings of this court, as a chattel mortgage under our law does not pass the title to the property, but only creates a lien thereon. *Silsby v. Aldridge*, 1 Wash. 117 (23 Pac. Rep. 836); *Kerron v. North Pacific, etc., Mfg. Co.*, 1 Wash. 241 (24 Pac. Rep. 445). Furthermore, it is questionable, at least, if said instrument was merely given as security, whether the recording of it would help the appellants' claim in any way.

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If it is to be treated as a mortgage, § 1648, Gen. Stat., provides that a chattel mortgage shall be void against creditors of the mortgagor or subsequent purchaser and “incumbrances” of the property for value and in good faith, unless it is accompanied by an affidavit of the mortgagor that it is made in good faith and without any design to hinder, delay or defraud creditors, and is acknowledged and recorded in the same manner as is required by law in the conveyance of real property. This instrument was not so executed. To hold that the affidavit and acknowledgment are not required where a bill of sale is given as security and is in effect a mortgage, would be to render such provisions of the law in relation to chattel mortgages nugatory, for the same could be avoided and fictitious claims created and spread upon the records by giving a mere bill of sale—a fraudulent device—instead of a mortgage. *Jones, Chat. Mort.*, § 275; *Shaw v. Wilshire*, 65 Me. 485; *Bird v. Wilkinson*, 4 Leigh, 266–274; *First National Bank v. Damm*, 63 Wis. 249 (23 N. W. Rep. 497); *Yenni v. McNamee*, 45 N. Y. 614. If it was intended as a mortgage it could hardly come under § 1454, because the bill of sale would not operate to *transfer* the property. Sec. 1646, same volume of the code, provides that mortgages may be made upon all kinds of personal property, but does not require the same to be in any particular form, and if a bill of sale is given as security and is only in fact and effect a chattel mortgage it should be held to be within the provisions of the act relating to chattel mortgages.

Under the great weight of the proof, appellants' claim that the instrument in question was an absolute bill of sale cannot be maintained. It is admitted that neither Sayward nor any of his agents had seen the property in question prior to, or at the time of, the execution of the bill of sale, nor until about a month thereafter. The consideration expressed in the bill of sale was \$500, and it was made subject to the

Holcombe mortgage. This mortgage was subsequently paid by Sayward, but instead of canceling the same he took an assignment thereof and held the debt against Thayer. The amount paid therefor was \$1,650, and this, with the \$500 expressed in the bill of sale, made \$2,150 as the total consideration for the property in question. The appellants could not tell anything about the condition or value of the property described in the bill of sale. The testimony upon the part of the respondents shows that such property, on April 7, 1891, was worth \$6,500. While this estimate may have been somewhat excessive, it fairly appears that said property was worth a great deal more than \$2,150, and the discrepancy between the consideration expressed and the value of the property is so great as to afford a strong presumption that the intention of the parties was not to make an absolute transfer of the title. It is claimed by the appellants that at the time the bill of sale was executed Thayer was credited with \$500 upon his account which it was claimed he was owing at the time to Sayward. Thayer disputed this and claimed that at said time Sayward was indebted to him for logs he had delivered to him over and above the amount he owed for merchandise. In this respect we think the weight of the testimony is with the respondents. The accounts were in the appellants' possession and were not produced upon the trial, nor was the failure to produce them satisfactorily accounted for. There was no accounting between them at the time the bill of sale was given and there had been none previously.

The most that could be claimed for this bill of sale is that it was a conditional sale of the property, and if this claim could be maintained it would operate to transfer the title to appellant Sayward sufficient for him to maintain this proceeding to recover possession as owner.

While the negotiations were pending, Thayer claims that

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he took a chattel mortgage to one Meigs, the agent of Sayward in charge of said mills, and that he refused to accept it, but said that he would take a bill of sale of the property, claiming, as Thayer testifies, that it would afford them better security. Consequently the bill of sale in question was prepared, and with it was a defeasance which was submitted to said Meigs by Thayer to be executed and returned to him. This instrument referred to the bill of sale, and provided that the property therein described should be reconveyed to Thayer, subject to the following conditions:

“Provided, The said W. H. Thayer shall faithfully and diligently conduct and manage the business of logging with the above described outfit and property, for which purpose we hereby agree and bind ourselves to hire and employ, and do hereby hire and employ, him as manager for the period of three years from the date hereof, and shall, from the proceeds of said business, or by other means pay or cause to be paid to us, our executors, administrators or assigns, within three years from the date of this instrument, the full sum of his indebtedness due us for supplies and cash to run said camp.”

And it provided that Thayer might demand such reconveyance at any time within the three years, upon the payment of such indebtedness.

This last instrument was never executed. Thayer testifies that Meigs agreed to execute the same and send it to him. That upon the night when the bill of sale was executed Meigs claimed that he was too tired to proceed with the business further, but would postpone it till morning, and that he only appeared in the morning a few minutes before the time for Thayer to leave the mill for the logging camp on the steamer then about to start, and that thereupon Meigs said he would execute said instrument and send it to Thayer. Meigs denied having had any such conversation and that such a document was ever submitted

to him or called to his attention, and he denied that they had ever talked about a chattel mortgage. His testimony, however, was overborne by that of the respondents. Had such a defeasance as is above described been executed, it would have tended strongly to support the claim made by appellants that at least a conditional sale of the property was effected. But it appears that Sayward, through his agents, undertook to place himself in such a position that he could claim the property had been absolutely sold to him. In this he has completely failed under the proofs, and we do not think that the unsigned document under the circumstances should have the effect of making the transaction a conditional sale instead of a mortgage. In a case of doubt as to whether an instrument is to be treated as effecting a conditional sale of property or as a chattel mortgage, it is generally resolved in favor of the latter. 1 Cobbey on Chat. Mort., §94; *Rockwell v. Humphrey*, 57 Wis. 410 (15 N. W. Rep. 394).

Certain errors are alleged by the appellants in rulings made by the court during the progress of the trial. After filing his affidavit and bond, Sayward filed a complaint setting up his claim to said property, and upon a motion of the respondents this complaint was stricken from the files. There was no error in this, for in such proceedings the case is tried upon the allegations of the affidavit.

Appellants contend that the court erred in allowing the respondents to show that Thayer claimed to be, and was, in possession of the property and conducted the camp after the execution of the bill of sale, because Thayer had signed Nickols' name to the paper in question. Respondents, however, were not concluded by the action of Thayer in the premises, and had a right to go into the whole transaction.

Appellants allege that the court erred in rendering a judgment against them for the amounts claimed by the respond-

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ents, disregarding the right of appellant Sayward to be first paid the amount due him from Thayer upon his account and on the Holcombe mortgage; but there was no error here. The court rendered the proper judgment in the premises for the amount of the respondents' claims, the same not exceeding the value of the property in controversy. Sayward could not recover Thayer's indebtedness to him in this proceeding, whatever legal proceedings he could take with regard thereto thereafter. Sec. 495, aforesaid, provides for the judgment that was rendered where the claimant fails to make good his title to the property.

The appellants allege that the court erred in refusing to permit them to show the condition and value of the property included in the bill of sale before and after April 7, 1891. There was no error here. There was no proof made or offered that the condition and quantity of the property was the same at the particular times when they wanted to prove its value as it was when the bill of sale was executed.

Several other errors were alleged by the appellants, but the same go to immaterial matters and have no bearing upon the question as to what the effect of the purported bill of sale was. Consequently it is unnecessary to further allude to them.

Affirmed.

DUNBAR, C. J., and STILES and ANDERS, JJ., concur.

HOYT, J., dissents.

[No. 693. Decided March 10, 1898.]

JOSEPH B. WOOD,* *Appellant*, v. H. P. NICHOLS AND
SPIRO BISAZZA, *Respondents*.

RESCISSION—PLACING PARTY IN STATU QUO—TENDER.

In an action to obtain the re-conveyance of land on the ground of fraudulent misrepresentation, a tender of the purchase price less the commission paid the agent negotiating the sale, he being the agent of the party seeking rescission, is not sufficient to uphold the action. (HOTT, J., dissents.)

Appeal from Superior Court, Mason County.

C. W. Hartman, for appellant.

George D. Blake, for respondents.

The opinion of the court was delivered by

SCOTT, J.—The plaintiff and appellant was the owner of certain land in Mason county, and he employed the respondent Nichols, a real estate agent, to negotiate a sale thereof for him. Sometime thereafter Nichols, as is claimed by appellant, informed him that Bisazza, one of the respondents, owned four lots in Galligher's Addition to Olympia which he would give, with \$300 in money, for appellant's land, and appellant claims a trade was negotiated upon that basis.

It does not appear that either of the respondents had seen said lots, or knew anything definitely as to their value or their situation. A deed from respondent Bisazza of four lots was submitted to appellant, and the same were therein described as being in Galligher's Addition to Brighton Park. The appellant found some fault with the deed in this particular, and also for the further reason that, according to a map which was inspected at the time, it appeared that there were two additions platted at different

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times and known respectively as Galligher's First and Second Additions to Olympia. Galligher's Addition to Brighton Park was a separate plat, without the city limits, and was not shown upon the map inspected. Some conference was had at that time between appellant and respondents and other parties with reference to the location of said lots, and appellant claimed it was represented to him that said lots were in Galligher's First Addition to Olympia, and the trade was consummated.

Sometime thereafter appellant undertook to locate said lots and found them, as he claimed, situated in a lake about one hundred rods long and seventy-five or eighty rods wide; said lots being about two hundred feet from the shore of said lake and covered with water from ten to twenty feet deep; and that, in consequence thereof, the same were worthless. And he brought this action to obtain a reconveyance of the lands that he had deeded to the respondent Bisazza therefor.

No tender was made, before the action was commenced, of the moneys which appellant had received from said Bisazza, nor was any deed tendered to him of the lots in question. After the institution of the suit, at the commencement of the trial, appellant made a tender of a deed to said lots and the sum of \$200 in money. It appears and is conceded that Bisazza paid \$300 in money, \$200 of it to appellant personally and \$100 to Nichols, who was authorized to receive the same by appellant. Nichols retained this \$100 as his commission. But appellant claimed that he (appellant) was entitled to \$50 of said \$100. At the conclusion of his case, upon a motion therefor by respondents, the court dismissed the action.

It appears from the testimony introduced that the location of said lots was misrepresented to appellant at the time of said sale, and he claims that such misrepresentations were fraudulent, and that in any event he is entitled to re-

cover whether fraudulent or not, the parties having been mistaken as to the location of said lots.

The lower court found that appellant had not made out a case in this particular, and it also found that he could not recover in consequence of his not having tendered the sum of \$300 with a deed to the lots to the respondent Bisazza. Upon this last ground, at least, the decision of the lower court must be sustained. . At no time did appellant offer to pay to Bisazza the sum of \$300, but he proceeded upon the theory that as \$200 was the only money he had received individually, it was all he was called upon to refund. It is conceded, however, that Nichols was his agent in the premises and that the commission for negotiating said sale was due from him to Nichols.

Under the circumstances appellant was in no position to maintain the suit and the court properly dismissed it.

Affirmed.

DUNBAR, C. J., and ANDERS and STILES, JJ., concur.

HORT, J. (*dissenting*).—I am unable to concur in the affirmance of the judgment in this cause. I agree with the majority of the court that the transaction was such that the plaintiff was entitled to have it avoided, and have his lots returned to him. I also agree with them that he could only have this done upon payment to the defendants of the three hundred dollars. In my opinion, however, equity having jurisdiction of the matter, it should not dismiss the action, but should allow plaintiff the relief to which he is entitled upon such conditions as will fully protect the rights of the other parties. It does not consist with my idea of equity to dismiss a plaintiff who is shown to be entitled to relief upon the performance by him of certain conditions simply for the reason that he did not tender a compliance with such conditions at the time he commenced his action. I think the proper course in such

Mar. 1898.] Opinion of the Court—Hoyt, J.

a case is for the court to grant the relief upon condition that plaintiff shall do what he ought to have offered to do before the commencement of the action, and impose such further terms by way of the costs of the action as will put the defendants in as favorable a condition as they could have been if the tender of the conditions had preceded the suit. Under this rule the judgment in the case at bar should be reversed, and the cause remanded with instructions to grant the relief prayed for by plaintiff upon condition that he re-convey the lots, conveyed to him, by deed, warranting against his own acts, and pay to the defendants the said sum of three hundred dollars, and interest thereon from the time he received it, and all costs of the action.

[No. 714. Decided March 10, 1893.]

JOHN KLOSTERMAN, *Appellant*, v. CHARLES VADER, E. A. TERRELL AND R. C. HULL, *Respondents*.

FRAUDULENT CONVEYANCES—ASSIGNMENT OF LEASE—CONSIDERATION.

The assignment of a lease of wild lands will not be set aside as a fraud upon creditors, although the consideration therefor was slight, when there is no proof that the lease was of some value.

Appeal from Superior Court, King County.

Allen & Powell, for appellant.

Sherwood F. Gorham, for respondents.

The opinion of the court was delivered by

HOYT, J.—This action was brought to set aside an assignment of a lease on the ground that the same was made

in fraud of the rights of the plaintiff as a creditor of the assignor. The lease assigned was for land in a wild state, with an annual rent reserved. There was no proof tending in any manner to show that the use of the leased premises was of any greater value than the rent to be paid therefor from year to year. In other words, the proofs did not show that the lease which was assigned was of any value whatever. Such being the fact, it is doubtful whether the court would aid plaintiff in reducing it to his possession. It would seem that before a creditor could ask the interposition of a court of equity he must show that by its aid he can obtain something which will be of some value in his hands. Whether or not this be so as a matter of law, it is clear that until it was shown that the lease was of some value, a small consideration would support its assignment. Upon the trial the court below found as a matter of fact that the assignment was made upon a valuable consideration sufficient to support it.

We have examined the proofs and are satisfied that this finding of the court was warranted. There are some features of such proofs which are open to criticism, but taking them all together and considering the fact that the lease was made by a sister to a brother, and was of wild land, which, until it had been improved by the labor of the lessee, would have little or no rental value, we think that they can all be harmonized and made consistent with the fact that the assignment was executed in the best of faith, and for a consideration not disproportionate to the value of the lease.

The judgment must be affirmed.

DUNBAR, C. J., and ANDERS, SCOTT and STILES, JJ.,
concur.

Mar. 1893.] Opinion of the Court—DUNBAR, C. J.

[No. 722. Decided March 10, 1893.]

SEATTLE GAS AND ELECTRIC LIGHT AND MOTOR COMPANY,
Appellant, v. THE CITY OF SEATTLE, *Respondent*.

APPEAL—WEIGHT OF TESTIMONY—INSTRUCTIONS—HARMLESS
 ERROR.

Where the testimony in a damage case is voluminous and conflicting, the verdict of the jury will not be disturbed on appeal, especially when the jury has examined the premises and property alleged to be damaged.

Although detached expressions in the court's charge to a jury, if considered as independent expressions, may be technically erroneous, yet if the instructions as a whole, and considered together, fairly state the law, in nowise misleading the jury, there is no prejudicial error.

Appeal from Superior Court, King County.

Blaine & DeVries (*E. C. Hughes*, of counsel), for appellant.

George Donworth, and *James B. Howe*, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—In this case it is strenuously insisted that the verdict of the jury is against the evidence. A large claim for damages is made, and the jury found that no damages had been sustained. The testimony is exceedingly voluminous, but we have thoroughly examined it in detail, and from such examination, especially considering the fact that the jury examined the premises and the property alleged to be damaged, we do not think the testimony presents that undisputed proof of damages which would justify this court in disturbing the verdict of the jury.

And after a careful examination of the authorities cited by both appellant and respondent, without particularizing or reviewing such authorities here, we are satisfied that while detached expressions in the court's charge to the

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jury, if considered as independent expressions, might possibly be technically erroneous, yet the instructions as a whole, and considered together, fairly state the law, and we are satisfied that the jury were in nowise misled by such instructions. The instructions are very lengthy, but it seems to us that every element of damage which the plaintiff was entitled to recover could have been properly considered by the jury under the instructions given. Stress is laid by the appellant upon the following alleged instruction:

“You are further instructed that the mere opinion of any witness who has testified in this case that in his opinion the damages which plaintiff has or will suffer by reason of said change of grade consists of, and was of, a given or named amount, such opinion as to the amount of damages is not binding upon you in any wise as to the amount of damages which plaintiff has sustained, if any damage it has sustained whatever.”

And, of course, if the court had given any such instruction some question might be raised as to its soundness. But no such instruction was given as an independent proposition, as made to appear by appellant's brief, but the language above quoted was followed by the following qualifying words, viz.:

“If the evidence shows that the opinion of the witness or witnesses is based upon speculative, remote or contingent damages which may arise in the future by reason of some additional improvements placed upon said premises, or if the proof of said witnesses shows that their opinion is based either wholly or in part upon some imaginary loss that might occur in the future, or is based upon a state of facts which might or might not occur in the future.”

It is true that a period occurs after the word “whatever,” the last word quoted by appellant, instead of a comma, as there should be; but the latter part of the paragraph would be entirely meaningless and senseless except

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as a condition to the first part; and a glance at the record so plainly shows that the latter part of the paragraph qualifies the first part that the criticism scarcely merits a notice. Believing that there was no error by the court, either in giving or refusing instructions, and that the case was fairly submitted to the jury, who are the sole judges of the credibility of the witnesses and the weight of the testimony, the verdict must stand.

The judgment is, therefore, affirmed.

ANDERS, HOYT, SCOTT and STILES, JJ., concur.

[No. 765. Decided March 10, 1893.]

WILLIAM WADHAMS, *Appellant*, v. ALFRED PAGE, *Defendant*, AND JOSEPH GREEN, *Respondent*.

APPEAL—TIME OF FILING STATEMENT—PARTNERSHIP—DISSOLUTION—NOVATION—PRACTICE—INSTRUCTING JURY TO FIND FOR PLAINTIFF.

The time within which a statement of facts should be filed on appeal begins to run from the date of the judgment on a verdict for the defendant, and not from the date of the verdict.

An agreement between parties, whereby the partnership is dissolved and one of them released from liability for past debts, does not bind a creditor to whom notice thereof is sent, when there is no consent or act of acquiescence on his part.

Where the defendant in an action of debt admits the indebtedness but sets up an affirmative defense which throws the burden of the issue on him, and the undisputed proofs show a failure to prove the facts necessary to sustain such defense, the jury should be instructed to find a verdict for the plaintiff.

Appeal from Superior Court, King County.

Burke, Shepard & Woods, for appellant.

Stratton, Lewis & Gilman (*Ernest S. Lyons*, of counsel), for respondents.

The opinion of the court was delivered by

HOYT, J.—In our opinion a case is no more terminated by a verdict for the defendant than by one for the plaintiff. In either case it is the judgment rendered upon such verdict that finally adjudicates the rights of the parties, and as it is conceded that the necessary steps were taken within thirty days after the rendition of the judgment upon the verdict, it follows that the motion to dismiss for the reason that they were not taken in time must be denied.

Plaintiff brought the action to recover of the firm of Page & Green an amount alleged to be due as a balance of account for goods sold and delivered. The defendant Green in his answer admitted the indebtedness as set out in the complaint, and set up two defenses to such claim—*First*, That the same had been fully paid; *second*, that the said firm had been discharged by reason of a novation by which it was agreed by the said plaintiff and the said firm of Page & Green and Alfred Page, one of the members of said firm, that the plaintiff would look only to the said Page for the payment of said account, and would and did discharge the said firm of Page & Green from all liability on account thereof.

The indebtedness alleged in the complaint having been admitted, the defendant was adjudged by the court to have the affirmative of the issue made by his said answer. Upon the trial such defendant not only failed to make out his defense of payment by affirmative proof showing that the amount had been paid, but, on the contrary, by his own proof showed beyond any possible question that the amount in controversy never had been paid by anybody. As to the second defense set up in the answer, the proof on the part of the defendant showed only that in March, 1884, the firm of Page & Green had been dissolved. That as between the members thereof it was agreed that Page

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should be entitled to the credits due said firm, and should assume the indebtedness thereof. That knowledge of the dissolution of the said firm, and of the fact that as between the partners Page was to pay the indebtedness, was communicated to the plaintiff some time during that month, or the early part of the April following. He introduced absolutely no proof tending in the least degree to show any consent on the part of the plaintiff to such arrangement, or any agreement by him that he would in any manner discharge the firm of Page & Green from liability and look only to said Page.

The only circumstance proven which could in the most remote degree tend to establish such consent or promise on the part of the plaintiff was the fact testified to by the defendant, that two years or more elapsed after such dissolution before any demand was made upon him by the plaintiff for the payment of the amount. Even this fact is not very satisfactorily established by the testimony of the defendant, for the reason that he practically admits that at an earlier date he was asked by a person representing himself as the agent of the plaintiff to make a note to cover the amount of said indebtedness. But assuming that the fact of this delay was established beyond any question, it would not in itself establish a consent or acquiescence on the part of the plaintiff in the arrangement between the members of the said firm of Page & Green. That there could be no change of the contract relations as between the firm of Page & Green and the plaintiff without his consent or acquiescence is too clear for argument. It follows that there was an entire failure on the part of the defendant to prove one of the facts necessary to constitute a novation which would bind the plaintiff.

If it appeared from the record that the plaintiff had continued for a long time to deal with Page, and had received money from him and applied the same upon his personal

indebtedness, there might be some ground for contending that such acts on his part, coupled with a long delay in attempting to assert the claim as against the defendant Green, would tend to prove a consent or acquiescence on the part of the plaintiff to the arrangement under which the firm of Page & Green had dissolved, and to in some measure at least warrant a claim that the money so paid by Page and applied by plaintiff on his personal account, should have been applied upon the account of Page & Green. But that such facts did not exist in this case is made very clear. It is an absolutely undisputed fact upon the whole record that every dollar of money paid by said Page, or by Page & Green, has been applied upon the account of the firm, and that the amount for which this suit was brought remains unpaid after such application. Counsel for defendant attempted in his argument to make something out of the circumstance that at the time an account was opened with said Page, a remittance of \$200 by him was credited to his account, instead of to the account of Page & Green. But the proof clearly shows that this same \$200 was very soon thereafter credited to the account of the firm of Page & Green, and the personal account of Page charged therewith. So that the situation is just the same as though said \$200 had been in the first instance credited to the firm of Page & Green.

There was then no proof introduced by the defendant tending to show the existence of all the facts necessary to sustain the defense of novation, as pleaded in the answer.

Under the circumstances of this case, as made by the pleadings, the plaintiff was entitled to a judgment for the amount claimed by him, unless one or the other of the defenses pleaded in the answer were established, and as the undisputed proofs show a failure on the part of the defendant to establish either of them, there was nothing which should have been submitted to the jury. The defense was

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an affirmative one, and was subject to the same rules as the case of a plaintiff who has the affirmative of an issue and upon a total failure to prove the facts necessary to sustain it, should have been taken from the consideration of the jury. The motion of the plaintiff, made at the close of the case of the defendant, that the jury be instructed to find a verdict for the amount claimed by the plaintiff in his complaint should have been granted, as, under the facts established by undisputed proofs, the plaintiff was entitled to recover.

The judgment must be reversed, and the cause remanded with instructions to the court below to enter a judgment in favor of the plaintiff for the amount sued for, with interest thereon to date of the entry of such judgment.

DUNBAR, C. J., and STILES, SCOTT and ANDERS, JJ., concur.

[No. 771. Decided March 10, 1893.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE SUFFERIN, *Appellant*.

BURGLARY—SUFFICIENCY OF INFORMATION.

An information for grand larceny which charges the breaking and entry of an office, is sufficient under Penal Code, §46, without also charging that such office was a place where goods, merchandise or valuable things were kept for sale or deposit.

An information sufficiently alleges burglarious entry with intent to commit a felony when it charges intent to commit grand larceny, followed by a statement of the acts intended, which, if carried into effect, would have constituted such offense.

Appeal from Superior Court, Jefferson County.

Andrew F. Burleigh, for appellant.

R. E. Moody, and *James A. Haight*, for The State.

The opinion of the court was delivered by

HOYT, J.—Appellant attacks the indictment upon which he was convicted in the court below upon two grounds— (1) Because it was not alleged therein that the office which was broken and entered was a place in which goods, merchandise or valuable things were kept for sale or deposit; and (2) because there is no sufficient allegation that the entry was with intent to commit a felony.

The argument in regard to the first objection is, that the words office, shop, store, warehouse, malt house, still house, mill, factory, bank, church, school house, railroad car, barn, stable, ship, steamboat and water craft, as used in our statute, are each qualified by the provision following: "Or any building in which any goods, merchandise or valuable things are kept for use, sale or deposit."

We are unable to construe the statute in this way. To us it seems clear that the statute was intended to provide that burglary may be committed upon and in any of the places particularly specified, and in addition thereto upon and in any other building in which any goods, merchandise or valuable things are kept for use, sale or deposit. There is, of course, a line of decisions which hold that statutes somewhat similar to ours should be construed as contended for by appellant, but in no case has a statute just like ours been thus construed. We are, therefore, free to construe our statute as we think the legislature intended, and thus construing it we are satisfied that an indictment which charges the breaking and entry of an office, without also charging that such office was a place where goods, merchandise or valuable things were kept for sale or deposit, is good.

As to the other objection, it is directly charged that the entry was with intent to commit a felony, and under our statute this alone would perhaps be sufficient; but it is not

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necessary that we should so hold to sustain this indictment, as it is further alleged that such felony was grand larceny, followed by a statement of the acts intended, which, if carried into effect, would have constituted such offense.

The indictment taken as a whole sufficiently charged the crime of burglary under our statute, and the judgment and sentence rendered thereon must be affirmed.

DUNBAR, C. J., and SCOTT and STILES, JJ., concur.

ANDERS, J., not sitting.

[No. 796. Decided March 10, 1893.]

CHARLES DIETZ, *Respondent*, v. GUSTAVE WINEHILL,
Appellant.

ACTION FOR BREACH OF CONTRACT—LEASE OF COMMUNITY LAND—
PARTIES.

The fact that one of two joint lessees paid all the money on the contract of lease does not warrant an action by him alone for breach of the contract.

An action for money had and received cannot be maintained for the breach of a contract, although such contract was invalid for the reason that it was a lease of community lands executed by the husband alone.

Appeal from Superior Court, King County.

Burleigh, Gamble & Burleigh, for appellant.

P. C. Ellsworth (*Vince H. Faben*, of counsel), for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—The respondent and H. F. Heuss jointly entered into a written indenture of agreement with the ap-

pellant by which they leased of appellant certain premises in the city of Seattle. The lease, by its terms, was to commence in the future. The contract was made June 16, 1890, and the lease was to begin October 1, 1890. In part performance of the conditions of the lease respondent gave to appellant a check for five hundred dollars payable on demand, and respondent and Heuss jointly executed a due bill for the remaining six hundred and twenty-five dollars, payable on demand.

Under our view of the law it is not necessary to discuss or state the reasons which led to the breaking of the contract upon either side. Respondent brought his individual action for the recovery of the money paid, ignoring the lease, and not making Heuss a party to the action. When plaintiff rested his case the defendant moved for a non-suit, which the court refused to grant. The evidence of the plaintiff plainly shows that the respondent and Heuss jointly executed the lease, and made themselves jointly responsible for the payment of the lease money. It may be true, as claimed by the respondent, that Heuss has no interest in the five hundred dollars which had been paid by respondent, but the action being brought on their joint contract, and for a breach of the same, Heuss becomes a party interested, and the appellant has a right to have the rights of all the parties to the contract litigated in one suit. If the complaint cannot be construed to be an action for a breach of the contract, but is, as asserted by respondent, simply for the recovery of the money paid, ignoring and disregarding the contract of lease, then there is a fatal variance between the allegations and the proof, and the case falls squarely within the rule laid down by this court in *Distler v. Dalmey*, 3 Wash. 200 (28 Pac. Rep. 335).

It is contended by the respondent that the suit could not have been brought on the lease contract for the reason that the lessor who made and executed the lease was, at

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the time of its execution, a married man, and that the wife was not made a party to the lease, did not sign the same, and it was, therefore, void, and would not sustain an action. Even if it were true that the action cannot be based upon a contract for the lease or sale of community real estate where the wife did not join, it does not follow that it would relieve the respondent from the obligation imposed by the statute to state the facts constituting his cause of action. This court, however, in the case of *Isaacs v. Holland*, 4 Wash. 54 (29 Pac. Rep. 976), where a lease was executed of community land by the husband only, held that the lease was not void, and that the lessees could not avoid the performance of the lease upon their part and abandon the premises and resist the payment of rent without first giving the lessors an opportunity to execute to them a valid lease. The same principle was followed by us in *Colcord v. Leddy*, 4 Wash. 791 (31 Pac. Rep. 320), and in *Hunt v. Stearns*, 5 Wash. 167 (31 Pac. Rep. 468).

The judgment will be reversed, and the cause remanded with instructions to grant the motion for a non-suit asked by appellant.

ANDERS, STILES and HOYT, JJ., concur.

SCOTT, J., concurs in the result.

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[No. 871. Decided March 13, 1893.]

THE STATE OF WASHINGTON, *on the relation of J. R. McDonald, Randall F. Smith and W. A. Butler, v. THE SUPERIOR COURT OF KING COUNTY, AND HON. RICHARD OSBORN, one of the Judges of said Court, Respondents.*

PROHIBITION—ENFORCING JUDGMENT ON STAY BOND PENDING
APPEAL.

Prohibition will lie to prevent the superior court undertaking to enforce the collection of a judgment against sureties on a bond for stay of execution, when notice of appeal from such judgment has been given and a *supersedeas* bond filed by the sureties.

Original Application for Prohibition.

Charles Lovejoy, for petitioner.

Richard Winsor, for respondent.

The opinion of the court was delivered by

SCOTT, J.—This is an application for a writ of prohibition against the respondent, directing him to desist from further proceedings in a case commenced in said superior court, wherein Louise Thompson is plaintiff and said J. R. McDonald defendant.

It appears that on the 9th day of April, 1891, judgment was rendered in favor of the plaintiff in said action. Thereafter, on the 12th day of May, 1891, said defendant executed a bond, with the relators Randall F. Smith and W. A. Butler as sureties, for a stay of execution. On the 5th day of October, 1891, said defendant gave a notice of appeal of said action to this court, and filed a *supersedeas* bond. On the 21st day of October, 1891, said court, upon the application of the plaintiff, entered judgment against the relators Smith and Butler, upon said stay bond; and

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on the further application of the plaintiff on the 3d day of November, 1891, said court entered an order commanding Butler to appear on the 5th day of November following, and answer on oath concerning his property. On the 3d day of said month of November said court entered an order fixing the appeal bond of said Smith and Butler at the sum of \$6,000, and on the next day said McDonald, principal defendant, and said Smith and Butler, filed a notice of appeal from the judgment upon the stay bond and executed a *supersedeas* bond in said sum of \$6,000, and on the 5th day of November said sureties moved to quash the proceedings against Butler, which motion was denied on the 30th day of said month. Prior thereto, on the 21st day of said month, on application of the plaintiff, said court entered an order for, and issued, execution in said suit; and on the 21st day of January, 1893, upon application therefor by the plaintiff, said court issued a bench warrant in said cause, commanding the sheriff to arrest said Butler and bring him before the court on the 23d day of said month of January. And thereupon said sheriff did arrest said Butler, who gave bail for his future appearance. And it further appears that said court is pursuing said supplementary proceedings and undertaking to enforce the collection of said judgments rendered against said principal defendant and his said sureties, from all of which appeals have been taken as aforesaid, and are now pending in this court.

The regularity of the proceedings upon said appeals is not questioned, but the respondent insists that there can be no appeal from said judgments; that by giving a stay bond defendant McDonald waived his right to an appeal, and that no appeal lies upon the part of the sureties from the judgment on the stay bond. However this may be, these are questions which can only be passed upon by this court. The effect of giving the notices of appeals and *supersedeas*

bonds as aforesaid was to remove said matters to this court, and to deprive the superior court of any jurisdiction to proceed in the premises otherwise than as to the preparation thereof for a hearing in this court in pursuance of said appeals.

Said sureties have a right to contest the validity of the action of the court upon the stay bond, and we are not called upon in this proceeding to determine what effect the giving of such stay bond had upon the right of the principal defendant to prosecute an appeal in the action. Such questions will be heard upon the appeal. It is sufficient now to say that said matters have been regularly appealed, and the same are now pending in this court. Consequently the peremptory writ must issue, and the relators will recover their costs herein of said Louise Thompson, the plaintiff in said action.

DUNBAR, C. J., and HOYT, ANDERS and STILES, JJ., concur.

[No. 793. Decided March 14, 1893.]

JUNIUS ROCHESTER AND CARRIE A. ROCHESTER, *Respondents*, v. ESTATE OF SARAH B. YESLER, *Deceased, et al.*, *Respondents*, FREEMAN P. KIRKENDALL *et al.*, *Appellants*.

STATUTE OF FRAUDS—PAROL CONTRACT TO CONVEY LAND—POSSESSION TAKEN AFTER VENDOR'S DEATH.

Where a written contract for the conveyance of land is so indefinite that it cannot be determined without resort to parol testimony, the contract is not taken without the operation of the statute of frauds by possession of the land taken subsequent to the death of the party agreeing to convey.

Appeal from Superior Court, King County.

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Greene & Turner, for appellants.

Thompson, Edsen & Humphries, for respondents.

The opinion of the court was delivered by

DUNBAR, C. J.—This action is based on the following contract:

“SEATTLE, W. T., July 30, 1887.

“Whereas, J. B. Metcalfe and his associates propose to construct a cable road along through the line of Mill, Main or Jackson streets, in Seattle, W. T., and to run cars thereon and to otherwise equip and operate said road which shall run from, at or near the Elliott Bay to Lake Washington along the line of one of said streets:

“Now, therefore, we, the undersigned property holders, hereby subscribe and donate to said enterprise, property as set opposite our names—contracts to convey said property, to be given conditioned upon the construction of the road, and deeds to same whenever the said road shall be completed.

H. L. YESLER, ten acres on Lake Washington.

S. B. YESLER, ten acres 10.

J. B. METCALFE.”

And is brought against the estate of Sarah B. Yesler, deceased, by the grantee of J. B. Metcalfe and his associates, to compel the execution of a deed to the petitioner, Carrie A. Rochester, by the administrator of the estate of Sarah B. Yesler, deceased, and praying that her title be quieted as against the estate and the heirs of the said Sarah B. Yesler, deceased. On the trial of the cause the court decreed that Carrie A. Rochester was entitled to a deed of conveyance, to be executed in due form by defendant J. D. Lowman, administrator of the estate of Sarah B. Yesler, deceased, for the lands described in the complaint, and that Lowman as such administrator execute such deed.

It is contended by the appellants—(1) That no jurisdiction existed in the superior court on such a petition to render the decree it did upon the evidence, for the reason

that the powers of the court upon such a petition were statutory, special and limited, and confined to the case and procedure specified in the statute; (2) that even if the court did have jurisdiction under the petition, the petitioners were not entitled to specific performance upon the evidence.

The view we take of the last proposition renders unnecessary a discussion of the first. It will be seen by reference to the alleged contract of July 30, 1887, that it does not constitute a written contract to convey any particular land; it is too indefinite to convey anything, and resort must be had to oral testimony to make any contract. The testimony as to what land Mrs. Yesler intended or promised to convey at that time is exclusively oral testimony. The map spoken of by Metcalfe is not in evidence; it is not referred to in any way in the written agreement, and all the testimony concerning it is oral. We think it will be conceded that this contract falls within the statute of frauds, and therefore cannot be enforced unless it is relieved by possession, and we have looked through the record in vain for any evidence of possession prior to the death of Mrs. Yesler. It is no doubt true that possession was taken of the land by Metcalfe and his associates, and that valuable improvements were placed thereon after Mrs. Yesler's death, but such possession is not sufficient to bind Mrs. Yesler, and therefore to bind her estate. There must have been possession before her death, and there must have been such a contract that under its conditions a court of equity could have decreed a specific performance against Mrs. Yesler. There was no such contract in existence at the time of her death, and none could grow into existence after her death to bind her estate. The very terms of the memorandum show that whatever undescribed land it was that she intended to convey, it was only to be conveyed upon conditions to be performed, and that no possession or

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any other right was granted at the time. There is no testimony whatever tending to show that there was any attempt to take possession of the land until after Mrs. Yesler's death.

On the subject of possession and improvement, Junius Rochester testified as follows:

“Q. When was the railroad completed? A. In September, 1888.

“Q. You think the clearing was commenced some time in 1888? A. Yes, I think towards the first of the year.”

Metcalf, who was the man who made the alleged contract with Mrs. Yesler, who was the organizer of the company, and who was the principal witness in this case, testified as follows:

“Q. What was done with reference to taking possession of this ten acres of ground and improving it, if anything? A. Well, all that part of it, I am not as familiar with as a number of others, but I know that there was clearing of the land soon after commenced; about the time, if I recollect right, or between the time of the beginning of the construction and the completion of the road.”

This is all the testimony there is as to the time when possession was taken and improvement commenced. This testimony shows that such improvements were made, and possession taken for the purpose of making improvements, between the commencement and finishing of the road, and further shows that the road was not commenced until the early part of the year 1888. But Mrs. Yesler's death occurred August 28, 1887, so that it is plain that no possession was taken of the land in dispute and no improvements made thereon until several months subsequent to her death.

The judgment will, therefore, be reversed and the cause dismissed.

HOYT, STILES, ANDERS and SCOTT, JJ., concur.

[No. 777: Decided March 16, 1893.]

C. C. BOWMAN, *Respondent*, v. H. J. MCGREGOR, *Respondent*, W. B. GOULD, *as the Sheriff of Clallam County*, AND THE PUGET MILL COMPANY, *Appellants*.

REPLEVIN OF PARTNERSHIP GOODS BY ONE PARTNER—ENJOINING JUDGMENT.

Where one partner has replevied partnership goods which had been levied upon under a judgment against his co-partner, he cannot enjoin the enforcement of a judgment against him for the return of the goods, or for their value, on the ground that the goods were the property of an insolvent partnership and that he had appropriated them to the use of said partnership.

Where the proof in a replevin suit shows that the defendant has merely a special interest in the property levied upon and does not show the amount, an erroneous judgment against plaintiff should be remedied by appeal and not by injunction.

Appeal from Superior Court, Clallam County.

Struve & McMicken, L. M. Lane, and James Kiefer, for appellants.

Benton Embree, for respondent.

The opinion of the court was delivered by

HOYT, J.—By this action plaintiff sought to enjoin the enforcement of a judgment rendered against him in an action of replevin, in which he, as plaintiff, had been defeated after a trial upon the merits.

There was no allegation in the complaint that such judgment was rendered by reason of any fraudulent representations on the part of the defendants therein, nor of any mistake of facts on the part of the plaintiff. There was an allegation that the property taken by the plaintiff in such replevin suit was not the property of the defendant, but was the property of a certain partnership of which the plaintiff was a member, which had been levied upon by the

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Opinion of the Court — HORT, J.

defendant under an execution issued upon a judgment against the other partner in said firm. Said complaint further alleged that such partnership was insolvent at the time of such levy, and that the plaintiff was unable to return the property taken from the defendant in said replevin suit for the reason that he had appropriated it to the uses of said partnership.

These were substantially all the allegations tending to show any reason why the judgment at law should not be enforced. In our opinion they were insufficient for that purpose. It is a well settled principle relating to the action of replevin, that the fact that the property taken is that of a person not a party to the action is no sufficient reason why there should not be a judgment in favor of the defendant for the return thereof, or for its value if a return cannot be had. This being the established rule as to such actions, it follows that under the allegations in this complaint the judgment for the defendant for a return of the property or its value was properly entered. And as there was no allegation of any such change of circumstances since such entry as would warrant the interference of a court of equity, we are unable to see any reason why it should be allowed to interfere to prevent the enforcement of such judgment.

There is a suggestion in the brief of respondent that the proof in the replevin suit showed that the defendant had only a special property in the goods taken, and that the amount thereof was not shown, and that for that reason the judgment in replevin was erroneous. However true this suggestion might be, it could afford no ground for the interference of a court of equity. If such judgment was erroneous, plaintiff should have sought relief against the same by appeal, and having failed to do so he cannot obtain such relief by a bill in equity. So far as we can see, the facts alleged in this complaint simply show an ordinary case of

the failure of the plaintiff to maintain the right to the possession of property which he has taken in replevin, and that as a result of such failure a judgment has been properly entered against him for the value of the property.

The complication as between the plaintiff and the other member of the partnership, while in some sense tending to show the existence of facts involving other principles than those above stated, does not, in our opinion, when carefully considered, take the case out of the general rule. The defendant, as sheriff, is responsible to the partnership for the property, and not to the individual partner who brings this action, and the plaintiff, as an individual member of such partnership, cannot, in the indirect method which he has sought, assert the rights of the partnership to the property against the claims of such defendant. If he were allowed thus to do it would force the defendant to participate in the adjudication of the partnership affairs at the instance of a single partner without the intervention of the other, or of the creditors of the firm, who, under the allegations of the complaint, would be more interested in the result than anyone else.

The plaintiff wrongfully sued out the writ of replevin, and, having done so, he must answer to the defendant for the property thus wrongfully taken possession of. As to what the rights of the firm are as against such defendant, we are not now called upon to adjudicate. We are unable to see any reason why equity should interfere with the enforcement of the judgment in the replevin suit.

It follows that the judgment rendered in the court below must be reversed, and the cause remanded with instructions to sustain the demurrer to the complaint.

DUNBAR, C. J., and STILES and ANDERS, JJ., concur.

SCOTT, J., dissents.

[No. 754. Decided March 21, 1893.]

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28	98

PACIFIC MANUFACTURING COMPANY, *Respondent*, v.
SCHOOL DISTRICT NO. 7, KING COUNTY, *Appellant*.

SCHOOLS AND SCHOOL DISTRICTS—LIABILITY FOR MATERIALS FURNISHED CONTRACTORS—CONSTITUTIONAL LAW.

It is not necessary that a school district should be made a party to a suit against a contractor for materials furnished in the construction of a school house in order to subject the district to liability for failure to take a bond from the contractor as required by Laws 1887-8, p. 15.

Laws 1887-8, p. 15, requiring bonds to be taken by school districts as municipal corporations does not violate art. 9, sec. 2, of the constitution, providing that "the entire revenue derived from the common school fund, and the state tax for common schools, shall be exclusively applied to the support of the common schools."

Appeal from Superior Court, King County.

A. G. McBride, J. F. Miller, and William Caldwell, for appellant.

Boyd J. Tallman, and C. A. Riddle, for respondent.

The opinion of the court was delivered by

STILES, J.—The only point of difference between this case and that of *Maxon v. School District No. 34, Spokane County*, 5 Wash. 142 (32 Pac. Rep. 110), is that judgment had been obtained against the contractor before the suit was brought against the district, and complaint is made that the district should have been made a party to the former suit; the evident answer to which is that the statute does not so require.

It is also urged that art. 9, § 2 of the constitution is violated by making the law of 1888, requiring bonds to be taken by school districts as municipal corporations. The section alluded to is as follows:

"The legislature shall provide for a general and uniform system of public schools. The public school system shall

include common schools, and such high schools, normal schools and technical schools as may hereafter be established. *But the entire revenue derived from the common school fund, and the state tax for common schools, shall be exclusively applied to the support of the common schools."*

What is meant by the "common school fund" in the second section is fully set forth in the third section. As yet there does not appear to be a "state tax." But neither of these funds need be trenched upon to pay this judgment, since the districts have other resources which are provided in Gen. Stat., §§ 817, 818, 820. Sec. 792 makes it the duty of the boards of directors to pay judgments against their districts.

Judgment affirmed.

DUNBAR, C. J., and SCOTT and ANDERS, JJ., concur.

HOYT, J., concurs in the result.

[No. 689. Decided March 23, 1893.]

HUTTIG BROS. MANUFACTURING CO. AND BRIDGE & BEACH
MANUFACTURING CO. *et al.*, *Appellants*, v. THE DENNY
HOTEL COMPANY, CORNELL UNIVERSITY *et al.*, *Respond-*
ents.

MECHANICS' LIENS—FOR WHAT MATERIALS—CLAIM OF FOREIGN
CORPORATION—NOTICE—VERIFICATION—PRIORITY OF LIENS—
ATTORNEYS' FEES—ESTOPPEL.

Where materials have been specially designed for a certain building and furnished the contractor therefor, a lien may be claimed for the whole amount furnished, although only a portion has been used in the construction in consequence of the contractor having suspended work on the building.

The filing of articles of incorporation by a foreign corporation and the appointment of an agent after the filing of a lien notice,

6	122
9	144
9	320
32*	1073
37*	287
37*	321
6	122
120	896
20	899
20	702
6	122
32	578
6	122
637	329
6	122
640	554

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but before suit to foreclose same, is a sufficient compliance with the law relating to foreign corporations doing business within the state.

Where a notice of lien is prematurely filed for the reason that the last portion of the materials furnished had not arrived, although on the way, the claimant has a right to file a second notice after the delivery of the materials.

Under § 1667, Gen. Stat., it is unnecessary that the attorney verifying a mechanic's lien notice for a foreign corporation should be specially authorized by appointment and the appointment filed in the office of the secretary of state.

Where there is a partial cessation of work upon a building because of differences between the owner and contractor, but the abandonment of the contract is not complete and permanent until after the furnishing of certain materials, lien may be claimed therefor.

An attorney's fee of \$2,000 for enforcing a lien of \$21,000 is excessive and should be reduced to the sum of \$1,000, or lower.

Under the provisions of our statutes, a material man can claim a lien only from the time he commenced to furnish materials for the building, and if such time is subsequent to the creation of a mortgage lien, of which he had notice, his claim for materials is subject thereto.

A mechanic's lien will not date, for the purpose of priority over mortgage and other liens, from the time the claimant commenced the preparation of the materials in another state, which, by the contract, were to be delivered at a certain building in course of construction in this state.

The fact that a mortgagee loaning money for the erection of a building on certain land reserves the right in the mortgage to pay liens that may be created against the property from the amount of the mortgage loan, does not make the mortgagee a party to such liens or estop him from disputing the claims of lienors.

Appeal from Superior Court, King County.

Wiley, Scott & Bostwick, W. W. Wilshire and G. E. De Steiguer, for appellant Huttig Bros. Manufacturing Co.; *Hanley & Proulx* and *Emmons & Emmons*, for appellant Bridge & Beach Manufacturing Co.; *Burke, Shepard & Woods*, for appellant Denny Hotel Co.

Fremont Cole, for respondent Cornell University.

The opinion of the court was delivered by

SCOTT, J.—Several actions were brought in the superior court of King county to foreclose liens against a hotel building and the ground upon which the same is situated, for materials furnished therefor; the Denny Hotel Company being the owner and Fabian S. Potvin the contractor for the erection of said building. The causes were consolidated and tried together by virtue of an order of the superior court, and three appeals have been taken from the decree therein rendered. The Denny Hotel Company appeals from the decree establishing the lien of Huttig Brothers Manufacturing Company; and the Huttig Brothers Manufacturing Company and the Bridge & Beach Manufacturing Company appeal from the provisions of said decree establishing the mortgage lien of the Cornell University as prior to their said liens. The appeal of the Denny Hotel Company as against Huttig Brothers Manufacturing Company will be first discussed.

Said plaintiffs claimed a lien for materials furnished for said hotel to said Potvin as contractor, amounting to \$21,000, and it appears that of this amount only \$2,300 was used in the construction of the building, said building never having been completed, and said contractor having abandoned work thereon. It is contended by the appellant, the Denny Hotel Company, that there can be no lien for materials furnished which were not used in the construction of the building; and it is further contended that the right to a lien for the materials that were used was lost in consequence of the respondent having intermingled said claim with the claim for materials not used. It is conceded that said materials were all furnished under a contract between said respondent and said contractor, and that the same were specially designed and made for said building, and are necessary to the completion of the building; that they have

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been delivered and are now upon the premises at the building. It further appears that the only reason why the same have not been used is in consequence of the contractor having suspended work. Under such circumstances we think the right to a lien for all of said materials exists.

A further point is made by the appellant to the effect that there can be no lien for the reason that the contract between the hotel company and Potvin released the hotel company from liability for liens; and that the sub-contractors were bound to take notice of this provision in the original contract. Whether or not such claim be well founded as a matter of law, we find no such provision in the contract in question. On the contrary, it contemplates that there may be liens upon said building, and provides, in case of an indebtedness created by said contractor at any time exceeding \$20,000 for labor on, or materials used in or about, said building, which would be or might become a lien thereon, that the hotel company at its option may apply any balance due or to become due said contractor to the payment of said indebtedness.

The further point is made that said respondent, being a foreign corporation, has no right to a lien because of not having complied with the laws of this state relating to foreign corporations doing business within the state. It appears that copies of the articles of incorporation were filed and the appointment of an agent made before the suit was commenced, but after the filing of the lien notice. We think this was a sufficient compliance with the law in this respect.

It is contended that the materials had not all been furnished when the claim of lien was filed, and that a party can have no lien for materials which have not been furnished at or prior to the filing of the lien notice. It appears that two lien notices were filed, one on March 7, 1891, which was ruled out by the court at the trial on the ground that

it was prematurely filed; but a subsequent notice filed May 13, 1891, after the delivery of all the materials, was admitted. The last portion of the materials had been shipped and were on their way here when the first notice was filed, but had not yet arrived. If in consequence of this the first notice was prematurely filed, it would not deprive the respondent of the right to file another notice after all the materials had been delivered.

It is contended that an attorney for a foreign corporation cannot verify a mechanic's lien notice for such corporation unless he is specially authorized by appointment, which must be filed in the secretary of state's office. Sec. 1667, Gen. Stat., provides, that such a claim may be verified by the claimant or some other person. We see no reason why a claim could not be verified by an attorney of the corporation, as was done in this instance.

It is contended that there can be no lien in this case because the materials were not furnished from the commencement on the credit of the building and premises, but were furnished solely on the credit of the contractor. This claim is not well founded. After an examination of the proofs we do not find anything to indicate an intention upon the part of the respondent to waive the right to a lien, or to furnish said materials solely upon the credit of the contractor, or that the same were so furnished. We think the contrary fairly appears.

It is contended that a portion of these materials were furnished after the contractor had abandoned said contract, and that there can be no lien for such materials for that reason. It does not appear that the contractor permanently severed his relations as contractor with the hotel company until about March, 1891. Some work was done along at various times up till about that time, and the contractor had charge of the building. The most that can be claimed is that there was a partial cessation of the work at

that time on account of differences between the hotel company and said contractor, but said suspension was not complete, and it was not known that it would be permanent until about March, 1891; and it appears that the materials in question were all shipped before said time, and in pursuance of a contract made by the respondent with said contractor prior thereto and when he was prosecuting the work, and this point is untenable.

The court allowed an attorney's fee of \$2,000, and the appellant alleges that this is excessive. There was proof to show that such services were worth from \$1,500 to \$2,500, none of the witnesses placing the value thereof below \$1,500. However, we are satisfied that the sum allowed was much too large. It is not the policy of the law to allow large or exorbitant attorneys' fees.

As to the appeal of the Huttig Brothers Manufacturing Company against the Cornell University, it appears that the contract between the hotel company and Potvin was entered into July 22, 1889, and the construction of the building was commenced thereunder in August following. The Huttig Brothers Manufacturing Company, a foreign corporation, contracted with Potvin to furnish certain materials for said building, and commenced the preparation of said materials at its place of business in the State of Iowa, in January, 1890, and commenced to deliver the same in September, 1890. On the 28th day of December, 1889, the Denny Hotel Company executed and delivered to the Cornell University, a corporation, its three promissory notes, two for twenty-five thousand dollars each, and one for fifty thousand dollars, and secured the same by mortgage of the lands upon which the hotel in question was being constructed.

Prior to the time Huttig Brothers Manufacturing Company commenced to furnish materials for said building they had actual notice of the execution and delivery of

this mortgage, and they commenced to furnish materials thereafter. Fifty thousand dollars of the money secured by this mortgage was paid January 4th, and the remainder March 1, 1890; the whole of it was paid before appellant furnished any materials for the building. The lower court rendered a decree establishing the lien of appellant, but found and decreed that the same was subsequent and subject to the lien of said mortgage, and an appeal was taken therefrom.

The hotel building in question was in process of construction at the time of the execution of this mortgage, and the money was borrowed with the understanding that it was to be used in putting up the building, and it is contended by appellant that its claim for materials furnished should be held prior to the mortgage lien, for these reasons.

Sec. 1666, Gen. Stat., provides that the liens authorized in that chapter are preferred to any lien, mortgage or other incumbrance which may have attached subsequently to the time when the building, improvement or structure was commenced, work done, or materials were commenced to be furnished, etc. It is contended in this case that, as the principal contractor had entered into the contract for the construction of the hotel and had commenced work thereunder prior to the execution of the mortgage, he would have had a lien paramount to the mortgage lien, which might have included appellant's claim, and that, consequently, appellant's lien should relate back to the time of the making of the original contract.

Sec. 1663 provides that every person performing labor upon or furnishing materials to be used in the construction of any building, etc., has a lien upon the same for the work or labor done, or materials furnished by each, respectively, etc., and this seems to contemplate that each lien shall stand upon its own footing. Consequently, appellant is not in a position to claim the right to be subro-

gated to the rights of the contractor in this particular, even if he could have enforced a lien including a claim for the materials furnished by appellant, as paramount to the mortgage lien, without having paid said claim or making such material man a party to the suit, if the time within which he could claim a lien for materials had not expired, which we do not decide. See *Crowell v. Gilmore*, 18 Cal. 370.

It may be well to say, however, that for aught that appears the contractor has no lien. It does not appear that he is attempting to enforce any, and it does appear that the building has not been completed and that work thereon has been suspended. In any event, the contractor could only foreclose for the balance due him upon the contract price, while, if appellant's claim is to be maintained, and the rights of sub-contractors and material men are to relate back to the time of the execution of the original contract and the commencement of work thereunder, liens might be enforced against the premises and made prior to the mortgage claim for a much greater amount than the original contract price. Under the provisions of our statutes a material man can only claim a lien from the time he commenced to furnish materials for the building, and if such time is subsequent to the creation of the mortgage lien, of which he has had notice, his claim for materials is subject thereto.

A great many cases have been cited by the appellant, and also by the respondent, from different states, construing the lien laws there in force, many of which are utterly worthless in undertaking to arrive at a correct interpretation or construction of our own laws upon that subject, as the statutory provisions involved are so essentially different. Some of them, however, contain provisions very much like our own, and under the weight of authority we think that appellant's claim in this particular cannot be maintained.

Appellant contends that it commenced to furnish materials from the time that it began to prepare the same for shipment in the State of Iowa, and in consequence of its having commenced the preparation thereof before the execution of the mortgage its lien is superior to the mortgage lien. But the lien can hardly date from the time appellant commenced the preparation of the materials in another state. It was to furnish the materials delivered at the building in the city of Seattle, and its claim cannot be held to have attached before the delivery thereof. *Williams v. Chapman*, 17 Ill. 423.

It is also urged by the appellant that, by reason of the testimony given to the effect that the Denny Hotel Company borrowed this money for the purpose of building the hotel, and that the Cornell University had notice of that fact, and sought to protect itself in the mortgage against any liens that might be created against the property by reserving the right to pay the same from the amount of the mortgage loan, it is estopped from disputing the claims of the lienors. The authorities are against this proposition, however. The respondent had a right to consider and contemplate the making of improvements upon the property as a basis for making the loan in question. And by seeking to protect itself in the mortgage against liens which might be enforced against the property, it cannot be held to have become a party thereto, or to have assumed any liability as to such liens. The provisions were inserted merely for its own protection. *Platt v. Griffith*, 27 N. J. Eq. 207; *Moroney's Appeal*, 24 Pa. St. 372; *Monroe v. West*, 12 Iowa, 119; 1 Jones on Mort., § 370.

The only questions raised in the appeal of the Bridge and Beach Manufacturing Company are disposed of in the discussion of the appeal of Huttig Brothers Manufacturing Company, and it is unnecessary to review them.

The decree of the lower court will be affirmed, except as

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to the attorney's fee allowed Huttig Brothers Manufacturing Company, which will be reduced to \$1,000. In placing it at this amount we have been governed by the attorney's fee of \$1,000 allowed the Bridge and Beach Manufacturing Company in foreclosing its lien for a much less sum, from which there was no appeal. As all parties interested seem to have acquiesced in this allowance, we have followed it. If it had been appealed from, we would have reduced both sums much lower.

In consequence of the modification of the decree, the Denny Hotel Company will recover its costs in this appeal against the Huttig Brothers Manufacturing Company. The Cornell University will recover its costs in the appeals of the Huttig Brothers Manufacturing Company and the Bridge and Beach Manufacturing Company.

STILES and ANDERS, JJ., concur.

HOYT, J., not sitting at hearing, being disqualified.

[No. 821. Decided March 23, 1893.]

PETER BELLES, *Respondent*, v. WILLIAM CARROLL *et al.*,
Appellants.

JUDGMENT BY DEFAULT—APPEAL—PRACTICE.

Where judgment has been irregularly entered against a defendant by default, he should seek a remedy by motion in the court below to set aside such judgment before appealing to the supreme court.

Appeal from Superior Court, Pierce County.

J. F. Ramage, for appellants.

H. G. Rowland, for respondent.

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32*	1060
35*	1061
6	131
432	162
6	131
138	35

The opinion of the court was delivered by

HOYT, J.—Appellants by this appeal seek to reverse a judgment alleged to have been irregularly entered against them as upon their default. The record shows that no motion was made in the court below to set aside the judgment, and such being the case this court will not enter into an investigation of the merits of the question as to whether or not such judgment was in fact irregularly entered; as, in our opinion, the appellants should have sought a remedy against such judgment by motion or otherwise in the court below before coming here. As we refuse to enter into an investigation of the merits, we shall not affirm the judgment of the court below but will simply dismiss the appeal so that the rights of the appellants to move against the judgment in the lower court shall not be interfered with.

DUNBAR, C. J., and SCOTT and STILES, JJ., concur.

ANDERS, J., not sitting.

[No. 866. Decided March 23, 1903.]

In the Matter of the Estate of Lewis H. Eyres, Deceased:
MARY M. BAKER *et al.*, Appellants, v. JENNIE H. EYRES,
Respondent.

APPEAL NOTICE—TIME OF FILING AFTER SERVICE.

Appellant has no right to retain a notice of appeal after service upon respondent beyond a reasonable time, and a retention of the notice for a period of two months without filing will justify the dismissal of the appeal upon motion by the respondent, based upon a short record.

Appeal from Superior Court, Lewis County.

Leroy A. Palmer, for appellants.

H. Julius Miller, for respondent.

The opinion of the court was delivered by

STILES, J.—This is a motion to dismiss upon short record. In response to the motion to dismiss, the appellants showed that the judgment of the superior court was entered September 26, 1892; that they filed a bond on appeal October 22d, and notice of appeal November 2d, of the same year. The notice of appeal, after service upon the opposite party, was retained by the attorney for appellants, until January 11, 1893. On February 20th, no transcript having been filed in this court, the respondent filed a short record, and on the 2d day of March gave notice of motion to dismiss, by mail, returnable March 17th. On the 7th day of March the transcript was filed without any showing justifying the delay, except that the filing in this court occurred within sixty days after January 11th. It is claimed by the appellants that, inasmuch as the statute does not prescribe any time at which a notice of appeal shall be filed in the office of the clerk of the superior court, after having been served upon respondent, it was his discretion to retain it as long as he saw fit, provided that it be filed within six months from the date of the entry of the judgment. We cannot concede this proposition to be correct. The notice should be filed with the clerk within a reasonable time, and we find that, in this instance, upwards of two months was not a reasonable time. It is evident that the filing of the transcript on the 7th of March was due to the prompting of the notice to dismiss, and we think the motion should prevail. So ordered.

DUNBAR, C. J., and SCOTT and HOYT, JJ., concur.

ANDERS, J., not sitting.

[No. 727. Decided March 24, 1893.]

THE DENNY HOTEL COMPANY OF SEATTLE, *Appellant*, v.
JOHN SCHRAM, *Respondent*.

CORPORATIONS—CAPITAL STOCK—LIABILITY OF SUBSCRIBERS—
SUBSCRIPTIONS BY OTHER CORPORATIONS.

A corporation in this state cannot enforce subscriptions to its stock until the full capital stock has been subscribed for.

Under the laws of this state one corporation cannot subscribe to the capital stock of another corporation.

Appeal from Superior Court, King County.

Hawley & Prouty, and Burke, Shepard & Woods, for appellant.

Hughes, Hastings & Stedman, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—There are two controlling questions in this case:

First, Is a subscriber to the stock of a corporation in this state liable for the amount of his subscription upon the failure of the corporation to obtain subscriptions to the extent of the full capital stock; or, expressed in other words, is the obtaining of the subscription to the extent of the full capital stock a condition precedent to the liability of the subscriber?

Second, Can a corporation under the laws of this state become an incorporator by subscribing for shares in another corporation?

On the first proposition the contention by respondent that the subscriber is not liable, we think, is sustained by the overwhelming weight of authority, as well as by right reasoning and the plain principles of justice and fair dealing. While it may be a well recognized principle, as asserted by appellant, that defenses to subscriptions are not

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6 153
32*1002
32*1004
6 134
8 680
32*1002
36*1001
6 134
9 490
32*1002
37* 701
6 134
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32*1002
32* 643
6 134
16 616
6 134
126 508

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avored by the courts, the principle can only be recognized in its application to inequitable defenses. Contracts of subscription and capital stock of corporations, like other contracts, are entered into by individuals with reference to the responsibilities imposed; in this case, no doubt, with reference to the relative responsibilities of the subscribers and the character and cost of the hotel to be constructed. The inequitable results of holding the subscribers bound in a case where the whole amount of the stock is not subscribed is set forth with so much clearness and particularity in *Salem Mill Dam Corporation v. Ropes*, 6 Pick. 23, a leading case on the subject, and the arguments and illustrations of the court in that case are so often repeated and so nearly universally endorsed, that we will content ourselves with a reference to and an endorsement of the reasoning in that case. Even in the absence of statutory requirements, such seems to be the prevailing holding.

“It is an implied part of the contract of subscription that the contract is to be binding and enforceable against the subscriber only after the full capital stock of the corporation has been subscribed. This condition precedent to the liability of the subscriber need not be expressed in the corporate charter nor the subscription itself. It arises by implication from the just and reasonable understanding of a subscriber that he is to be aided by other subscriptions. This rule is supported also by public policy, in that corporate creditors have a right to rely upon a belief that the full capital stock of the corporation has been subscribed.” Cook, *Stock and Stockholders* (2d ed.), § 176.

“It is a general principle that the members of a corporation cannot be required to pay assessments upon their shares until the company is authorized by law to begin the prosecution of its enterprise.” 1 Morawetz, *Priv. Corp.*, § 137.

The capital of a corporation being fixed by its charter, the corporation has no authority to begin business until the whole amount of such capital has been subscribed.

Hence it follows that the members cannot be required to pay assessments until the full capital stock is subscribed.

“When the capital stock and number of shares are fixed by the act of incorporation or by vote or by-law, no assessment can be lawfully made on the share of the subscriber until the whole number of shares has been taken.” 2 Waterman, Law of Corp., § 183.

“As a general rule, where, on the organization of a corporation, the number of shares of the capital stock and the sum to be paid for each share are agreed upon and inserted in the agreement of subscription, the subscribers are not bound to pay their subscriptions until the requisite number of shares is filled up by subscriptions.” Thompson on Liability of Stockholders, § 120.

Green’s Brice’s *Ultra Vires* (2d ed.), p. 153, after stating the rule that corporations having the power to raise a definite capital may begin their business before that capital or any portion thereof is obtained, says, in note a:

“The American rule seems to be the reverse of that stated in the text; where the number of shares and the amount of capital is fixed, the whole stock must be subscribed before the corporation can begin business, unless the constating instruments expressly remove this restriction.”

The cases cited by these authors fully sustain the text, and we think the rule, in America at least, is firmly established, unless a contrary contention appears expressly or by implication, either in the charter or the contract of subscriptions.

But outside of the decisions on general principles of law and equity, the statute of our own state, it seems to us, puts this question beyond a peradventure. Sec. 1497, Gen. Stat., provides that “no such corporation shall commence business . . . until the whole amount of its capital stock has been subscribed.” The only object of collecting assessments from the subscribers is to carry on the business of the corporation, and the law prohibiting it

from commencing business until the whole amount of its capital stock has been subscribed, by the strongest implication at least, prohibits it from collecting assessments before that condition is complied with. We see nothing in the articles of incorporation to take this case out of the general rule, or that will estop the subscribers from making the defense pleaded herein.

As to the second proposition, a corporation can only be formed in the manner provided by law and has only such powers as the law specifically confers upon it. We do not think that a corporation was within the contemplation of the legislature when they used the expression "two or more persons," in § 1498, Gen. Stat. It is true that § 1709, Code Proc., provides that the term "person" may be construed to include the United States, this state, or any state or territory, or any public or private corporation, as well as an individual. But it does not follow, by any means, that the term "person" is always to be construed as a private corporation any more than it is always to be construed as the United States.

Morawetz on Private Corporations, § 433, says: "A corporation cannot, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation; nor can it do this indirectly through persons acting as its agents or tools;" citing *Central R. R. Co. v. Pennsylvania R. R. Co.*, 31 N. J. Eq. 475. The author, continuing, says: "The right of forming a corporation is conferred by the incorporation laws only upon persons acting individually, and not upon associations."

This, it seems to us, for manifest and manifold reasons, is in accordance with public policy; and we therefore decide that under the existing laws of this state one corporation cannot subscribe to the capital stock of another corporation. And, in any event, in this case the amount of the capital stock of the building company was so ex-

ceedingly small compared with the amount of the liability which it sought to assume (its subscribed stock being \$64,000 and its capital stock only \$54,000), that there was no apparent ability to pay the amount subscribed; and while it may be true that a party's contract will not be held void if it is not apparent that he is worth the entire amount of money necessary to carry it out at the time it is made, yet the disparity here is too great, and there is not only not "an apparent ability to pay," but there is an apparent inability to pay.

We find no error in the proceedings of the court below and the judgment is therefore affirmed.

STILES, ANDERS and SCOTT, JJ., concur.

HOYT, J., disqualified.

[No. 891. Decided March 24, 1893.]

EDMUND SEYMOUR, *Appellant*, v. THE CITY OF TACOMA,
HERBERT S. HUSON, S. J. SMYTH AND TACOMA LIGHT
AND WATER COMPANY, *Respondents*.

MUNICIPAL CORPORATIONS—PURCHASE OF WATER WORKS—ISSU-
ANCE OF BONDS—SUBMISSION TO VOTERS—REGISTRATION—
TITLE OF ACT.

The provision of the act of March 26, 1890 (Laws 1889-90, p. 520), authorizing cities to purchase water works and light plants which had theretofore been erected by private enterprise, is sufficiently expressed in the title of the act, which reads, "An act authorizing cities and towns to construct internal improvements, and to issue bonds and pay therefor."

An ordinance providing for the purchase by a city of the existing plant of a light and water company, embracing its water works and electric light plant, with a certain exception, and that the city extend the water works by a gravity system from certain springs, is sufficient without the ordinance containing a schedule showing the extent of territory covered, the miles of pipe laid and of what sizes, the sources of water supply and the extent of the rights of the seller therein, the quantity of water available, and if brought to the

6	138
6	428
32*	1077
33*	1069
6	138
8	249
32*	1077
35*	1079
6	138
13	117
13	143
14	607
114	618
6	138
15	499

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city in aqueduct or flume, of what capacity, the capacity of the pumping stations and their character, and the amount of land and where situate.

Under the act of March 26, 1890 (Laws 1889-90, p. 520), and the amendment thereof (Laws 1891, p. 326), the question of purchasing water works and light plant, and paying therefor with the proceeds of bonds, may be submitted to the voters at the same election as one proposition.

It is not necessary that the ordinance itself providing for the purchase of water works should be set out in full in the election notice where the latter contains a fair statement of the matters to be voted upon.

There is no state law requiring registration of voters at elections to decide upon propositions for purchasing water works and light plants, and bonding the city to pay therefor.

Appeal from Superior Court, Pierce County.

Alfred E. Buell, for appellant.

F. H. Murray, and *Galusha Parsons*, for respondents.

The opinion of the court was delivered by

STILES, J.—The appellant sought to enjoin the holding of an election in the city of Tacoma, looking to carrying out the scheme which is set forth in the following ordinance:

“ORDINANCE No. 790.

“An ordinance to provide for the purchase of the water works and electric light plant, and all such water supplies, riparian rights, rights-of-way, lands, lots, personal property and franchises as are now owned or operated by the Tacoma Light and Water Company as part of such water and electric light plants, excepting their distributing system in the town of Puyallup; and for extending said water works and making additions thereto by the adoption of a gravity system of water works; to declare the estimated cost of said additions and extension; to provide for borrowing money to be used in payment therefor by issuing the negotiable coupon bonds of said city for the sum of two million one hundred and fifty thousand dollars; and to provide for calling a special election for submitting such questions to the qualified voters of said city for their ratification or rejection.

“*Be it ordained by the City of Tacoma:*

“SECTION 1. That the offer of the Tacoma Light and Water Company to sell the water works and electric light

plant, and all such sources of water supplies, riparian rights and rights-of-way, lands, lots, personal property and franchises as are now owned or operated by the Tacoma Light and Water Company, as part of such water and electric light plants, excepting their distributing system in the town of Puyallup, for the sum of one million seven hundred and fifty thousand dollars, be and the same is hereby submitted to the qualified voters of the city of Tacoma upon the terms and subject to the conditions hereinafter particularly specified.

“SEC. 2. If said city shall become the owner of said water works and electric light plant and sources of supply, it will extend said water works by additions thereto by a gravity system, so that the same shall be sufficient to adequately supply the said city and its inhabitants with pure, fresh water sufficient for all their necessary uses, which extensions shall be substantially as follows: Thirty-eight-inch conduit pipe from Patterson and Thomas springs to the reservoir of the Tacoma Light and Water Company in the city of Tacoma, distant from said Patterson springs about sixteen miles, and distant about thirteen miles from said Thomas springs; connections from reservoir site to station ‘B’ of the Tacoma Light and Water Company, near the intersection of Hood and O streets in said city; the erection of a hydraulic pump at a suitable junction of the waters of said springs; the estimated cost of which extensions is four hundred thousand dollars.

“SEC. 3. For the purpose of borrowing money to be used in payment for said water works, electric light plant and sources of supply, and for the construction of said extension to said water works, the city of Tacoma shall issue its negotiable coupon bonds for the sum of two million one hundred and fifty thousand dollars, payable to bearer twenty years from the date thereof, with interest at the rate of five per centum per annum, payable semi-annually; both principal and interest shall be payable in gold coin of the United States of America of the present standard of weight and fineness, at such banking house or trust company in the city of New York as shall be designated in said bonds.

“SEC. 4. The mayor is hereby authorized and directed, in case of the ratification by the qualified voters of said

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city, at an election for the submission of said proposition as hereinafter provided, to issue in the name of said city, signed by himself as mayor, attested by the city clerk under the seal of said city, and countersigned by the city controller, two thousand one hundred and fifty negotiable coupon bonds of one thousand dollars each, to be designated upon the face thereof 'Water and Light Bonds of the City of Tacoma,' with interest thereon as provided in the third section hereof; which bonds shall be numbered respectively from one to two thousand one hundred and fifty, and shall, when so signed, attested and countersigned, be delivered by the mayor to the sinking fund commission of said city for sale and negotiation, as hereinafter provided.

"SEC. 5. The said sinking fund commission shall negotiate the sale of said bonds, after having duly advertised the same for sale at least thirty days preceding the day of sale: *Provided*, That said bonds shall not be sold for less than par and accrued interest. Said sinking fund commission shall, immediately upon the receipt of the moneys received for said bonds, pay all moneys so received into the city treasury.

"SEC. 6. In case of the ratification of the said proposition by the qualified voters of said city, at the special election herein provided for, the said sinking fund commission is authorized and instructed, upon the execution and delivery by the said Tacoma Light and Water Company of a good and sufficient deed, with covenants of warranty to vest in said city a perfect title to said water works, electric light plant and sources of supply, said deed to be approved by the city council, to pay out of the money received for the sale of said bonds, to the said Tacoma Light and Water Company, the sum of one million seven hundred and fifty thousand dollars, the same to be accepted by said company in full payment therefor.

"SEC. 7. That a special election be held in and for said city upon the eleventh day of April, A. D. 1898, for the purpose of submitting to the qualified voters thereof the question, whether said city shall purchase the water works and electric light plant and the sources of supply owned by said Tacoma Light and Water Company, for the sum of one million seven hundred and fifty thousand dollars, and

construct additions and extensions thereto at an estimated cost of four hundred thousand dollars; and whether said city shall borrow the sum of two million one hundred and fifty thousand dollars, to be used for the payment therefor, and issue its negotiable coupon bonds for said sum.

“SEC. 8. The form of ballot to be used at said election shall be: ‘Shall the city of Tacoma purchase the water works and electric light plant and sources of supply of the Tacoma Light and Water Company for the sum of one million seven hundred and fifty thousand dollars; and construct extensions to said water works at an estimated cost of four hundred thousand dollars, and borrow the sum of two million one hundred and fifty thousand dollars, to be used for said purpose, and issue its negotiable coupon bonds therefor.’ All persons in favor of said proposition shall vote as follows: ‘For the purchase of the water works, electric light plant and sources of supply of the Tacoma Light and Water Company, and the construction of extensions to said water works, and the issuing of negotiable coupon bonds of the city therefor.’ Those voting against said proposition shall vote as follows: ‘Against the purchase of the water works, electric light plant and sources of supply of the Tacoma Light and Water Company, and construction of extensions to said water works, and the issuing of the negotiable coupon bonds of the city therefor.’

“SEC. 9. Said election shall be held at such voting places in the several precincts of said city, and shall be conducted by such judges and inspectors of elections, as may be hereafter designated and appointed, and shall be conducted in all respects as provided by the charter of said city and the general laws of the State of Washington. The city clerk shall give at least thirty days’ notice of the time, place and purpose of said election, and of the proposition to be submitted thereat, together with the form of ballot to be used; which notice shall be published in the city official newspaper for thirty days next preceding said election, and shall be posted for the like period at all of the places designated therein for holding said election.

“SEC. 10. This ordinance shall, immediately after its passage and approval by the mayor, be published in the official newspaper of said city for three days consecutively,

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and shall take effect upon the expiration of such publication."

The following are the points raised as objections to the validity of the ordinance as the basis for the popular vote on the proposition to be submitted:

1. The action sought to be taken by the city is under authority of, and in accordance with, the provisions of the act relating to internal improvements in cities and towns, approved March 26, 1890 (Laws 1889-90, p. 520), as amended March 9, 1891 (Laws 1891, p. 326); and it is contended that this act, in so far as it is a grant of power to "*purchase*," is void for the reason that it is not mentioned in the title of the act which relates merely to "*construction*."

2. The ordinance fails to specify the works and plant with sufficient detail to enable the taxpayers to determine, without going to other sources of information, the expediency of purchasing the property offered, and at the price named.

3. The act provides that the ratification of the system or plan proposed and the assent to the incurring of indebtedness shall be submitted to the voters as separate questions.

4. The ordinance provides by its terms that the proposition therein contained shall be submitted to the voters, while the act requires that the ordinance itself shall be submitted.

5. The amendments to the registration law enacted in 1893 having become a law March 7th, there could be no election April 11th, because the terms of the law and certain provisions of the city charter would not give sufficient time for a fair or effective registration of voters.

The city of Tacoma is a city of the first class, organized under a freeholders' charter in 1890, and its position is, that as a city of that class it is not dependent upon the act of 1890, above referred to, either for its authority to pur-

chase water or light plants, or for its power to issue bonds therefor; nor is it bound by the requirements of that act when it proceeds to acquire property of the character here in question. In support of this position our attention is called to the fact that the original legislative charters of the same city all had more or less in them in the way of authority to provide and maintain water works (Laws of 1875, p. 168; 1881, p. 75; 1883, p. 319; 1886, p. 197); in some of them the maintenance of lighting systems was included; and purchase was more than once specified as the means by which such institutions might be acquired.

And again it is pointed out that two days before the act of March 26, 1890, was approved, another act, known as the "enabling act" (Laws 1889-90, p. 215), for cities of the first class, was approved, with the following as powers expressly enumerated in § 5:

"Paragraph 14. To provide for erecting, *purchasing* or *otherwise acquiring* water works within or without the corporate limits of said city, to supply said city and its inhabitants with water, or to authorize the construction of same by others when deemed for the best interests of such city and its inhabitants, and to regulate and control the use and price of the water so supplied.

"Paragraph 15. To provide for lighting the streets and all public places, and for furnishing the inhabitants thereof with gas or other lights, and to erect or *otherwise acquire* and to maintain the same, or to authorize the erection and maintenance of said works as may be necessary or convenient therefor, and to regulate and control the use thereof."

The fourth paragraph of the same section authorized the borrowing of money for corporate purposes and the issuance of negotiable bonds therefor in such manner as should be prescribed in its charter; and this provision was somewhat amplified in the charter adopted. Unquestionably, if the act of March 26, 1890, had never been passed, the provisions of the act of March 24th must have been

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held to empower the city of Tacoma to acquire water and lighting plants and to issue negotiable bonds to pay the cost of the same; and if her charter prescribed the manner and conditions of issuing the bonds, in compliance with the constitutional requirements, she could now proceed without hindrance from this appellant on the grounds here alleged. This inferentially appears from the language of "paragraph four," above mentioned, which limits the indebtedness possible to ten per cent. of the city assessment roll; whereas, under the constitution, all above five per cent. would be void unless procured for water, light or sewers. Whether the charter does prescribe any manner or conditions of issuing bonds, we shall not now examine, however, for reasons which we think are found in the law, and which obviate the necessity of it.

Prior to the acts of 1890, so often mentioned, cities did not have the right to create indebtedness by the issuance of negotiable bonds. The act of February 26th (Laws 1889-90, p. 225) extended to every incorporated town then existing the right to borrow money and fund its debts in aid of municipal purposes. The enabling act of March 24th continued these rights to such cities of the first class as chose to come under its provisions; but the general municipal incorporations act of March 27th withheld these powers from cities of the lower classes, until 1891, when the oversight was corrected by the act of March 7th of that year (Laws 1891, p. 261), and all cities in the state, whether old or new, were placed upon the same footing. All cities, however, were empowered, by the act of March 26, 1890, to construct internal improvements, and to issue bonds to pay therefor. At that time the city of Tacoma was existing under its charter of 1886; for although on March 24th the "enabling act" had been approved, with an emergency section, it was a mere dormant statute until each city to which it was applicable should elect to adopt

a charter in accordance with its requirements. In the meantime the act of March 26th was the source of its power, the measure of its authority and the law of its proceedings in the construction of internal improvements by the issuance of bonds to pay therefor.

But with this law thus impressed upon her, and under the proviso of the constitution that in framing her freeholders' charter she must make it consistent with, and take it subject to, the laws of the state, it is suggested that because of the powers enumerated in the "enabling act" the general law existing at the time she adopted her new charter (the act of March 26th) should be held to be no longer of any binding force as to her. The answer to this proposition, it seems to us, is found in the further expression of the constitution (art. 11, § 10), that the new charter should "supersede any existing charter [of 1886] including amendments thereto, and all special laws inconsistent with such charter." General laws were not to be affected and cannot have been affected unless there be found in the "enabling act" such positive expressions as would amount to a repeal of the general law, *pro tanto*, under the rules for interpreting statutes.

But the mere fact that the power to provide water works, light plants and sewers, and to pay for them with money raised by bonds, is conferred over again would not suffice to construe a repeal therefrom. All that is necessary to harmonize the two laws is to construe the authority to borrow money and issue bonds contained in paragraph four of the fifth section, as subordinate to the provisions of the other act which was passed at a later day, although in the same session; and we believe that when this is done the true intent of the legislature will be carried out.

Now to consider appellant's points in their order:

1. The subject of the act of March 26, 1890, included the purchase of water works and light plants which had

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theretofore been erected by private enterprise. The first section proves it to a verbal demonstration. The title, however, is: "An act authorizing cities and towns to *construct* internal improvements, and to issue bonds and pay therefor, and declaring an emergency." Ordinarily, the meaning of the word "construct" in the sense here meant would be to build or make; but to give the law any effect whatever, it must have been known to the legislature that more than the mere cost of construction involving the labor necessary would have to be implied. In making every such improvement, the machinery and piping must be purchased, and they constitute a very large proportion of the cost. But that is not all. In building systems of water works especially two other things must be looked after, unless the cities for which they are provided lie immediately upon the lake or stream which furnishes the source of supply; these are the right to take water, and the necessary land for rights-of-way, reservoirs and buildings for machinery.

If one should contract with another for the construction of a house, no one would suppose for a moment that the agreement to "construct" implied an agreement to furnish the land whereon the house must stand; but a gross contract to "construct" a system of water works for the city of Tacoma, with Green river as a source of supply, and turn it over ready for operation, would certainly imply that when the works were finished the perpetual right to have them remain where they were, with the waters of Green river flowing into them, should be secured to the city. Thus, under this power to construct, all but the mere labor would be accomplished by purchase in most cases, and there would seem to be no good reason why water rights, land, pipes and machinery should not be purchased, although they be already in use for a like purpose. The labor only is, therefore, left unprovided for.

Moreover, at the time this law was passed, it was supposed by the legislature, as the body of the act shows, that

some of the cities of the state already had, or would have. both water and lighting systems, the property of private persons or corporations which it would be desirable to acquire; and probably the expression of the authority to purchase or condemn such existing plants was due to the economical reason that wherever such private works are of anything like adequate capacity to supply the requirements of the cities in which they exist, the successful operation of rival works by those cities would be more than doubtful, since all such businesses are in their nature monopolies and not subject to the ordinary laws of supply and demand. It might be that in some cases an existing water company would be in possession of the only practicable supply, with a complete system of machinery, reservoirs and distributing pipes, and it might even, in such an instance, be desirable that the city should own and operate its own water works. But it would be oppression of the most tyrannical kind to take away from the water company its source of supply without at the same time taking the rest of its plant; and yet that city, according to the argument of the appellant, would be shut out from the benefit of this law.

As showing how the legislature which passed this act regarded the matter, we may refer to the emergency section. After having provided in the first section for constructing, purchasing, condemning, adding to and maintaining these works, the seventh section recited that, whereas there was no law in this state authorizing cities and towns to construct internal improvements and to issue bonds to pay therefor, an emergency existed which justified its immediately taking effect. Now an emergency clause in our legislation is the last thing passed upon, after the bill itself has received a constitutional majority in both houses. So there could have been no misunderstanding, and the word "construct" was supposed to be sufficient to cover all that was granted in the first section.

The object of the requirement that the subject of an act

shall be expressed in its title is, that no person may be deceived as to what matters are being legislated upon. The real purpose of this act would have been better expressed had the word "provide" been used, but we think the word "construct," under all the circumstances, may be accorded a similar meaning, rather than to defeat the operation of what is probably the most important feature of this law, upon the technical significance of a word, where it can hardly be contended that anyone was likely to be deceived. As the constitution has not indicated the degree of particularity necessary to express in its title the subject of an act, the courts should not embarrass legislation by technical interpretations based upon mere form or phraseology. The objections should be grave, and the conflict between the statute and the constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that the double subject was not fully expressed in the title. *Montclair v. Ramsdell*, 107 U. S. 146 (2 Sup. Ct. Rep. 391).

2. As to the second point, we think the ordinance was sufficient. What was said by this court in *Metcalf v. Seattle*, 1 Wash. on page 300 (25 Pac. Rep. 1010), as to the necessity of disclosing to the voters the system or plan of works proposed, is invoked to support the proposition that the ordinance should contain a schedule showing the extent of territory covered, the miles of pipe laid and of what sizes, the sources of water supply and the extent of the rights of the seller therein, the quantity of water available and how brought to the city, and if in an aqueduct or flume, of what capacity, the capacity of the pumping stations and their character, the amount of land and where situate.

The statute does not require any such thing, nor do we think it would be reasonable in any case to require it. If it were proposed to construct anew all of the works intended to be purchased in this case, no such particular

inventory could be expected, and it would not be necessary to have it in order that the entire scheme might be made known to the voters.

The system or plan here is to be—*First*, The existing plant of the Tacoma Light and Water Company, embracing its water works and electric light plant, excepting its distributing system in the town of Puyallup; *secondly*, an extension of the water works by a gravity system from the Patterson and Thomas springs, sixteen and thirteen miles distant, respectively. If any person who has been a resident of the city of Tacoma long enough to vote upon the question cannot understand this as a system or plan, he would never do so upon reading a schedule of pipes, pumps, etc. It might as well be demanded that both chemical and microscopical analyses of the water from each source of supply be made a part of the ordinance. The quality of the water would be a very important item of consideration in connection with any scheme of this kind; but the statute was not intended to prescribe details. Something must be entrusted to the mayor and council, and it is to be presumed that they will see after titles, size of pipes, capacity of pumps, permanency and purity of supply, and all such matters of detail, and that general information will naturally be diffused through the community upon all these subjects during the period of notice.

3. Under the amendment to § 2 of the act, made in 1891 (Laws, p. 326), if the city authorities desire, they may submit two propositions to the voters at the same election, viz.: (1) Will you adopt this system or plan and pay therefor out of the current revenue? (2) Will you adopt it and pay for it with the proceeds of bonds? On the other hand, either proposition may be submitted alone, as is intended in this case. The mere adoption of the system or plan would not amount to anything in any case, unless a means of payment went with it; and this is especially so where

an expensive plant is to be purchased. The change in the language of the statute has not bettered it. It is still awkward. But in our judgment it either means just what it did before, or it means nothing, so far as providing these works without going into debt is concerned. We will not convict the lawmakers of an absurdity by holding that they meant that a system or plant might be adopted without regard to realization or payment.

But, it is said, the voters in this case might be willing to adopt the system proposed, but not at the price named; to which it is enough to say that the statute does not contemplate trial or half-way elections. It must be presumed in any such case that the city authorities have done their part, and that the proposal submitted is in their judgment wise; after which the voters must say whether they are satisfied to have the round proposition adopted or rejected.

4. It is conceded by appellant that the electors are not called upon to vote for or against the ordinance, but he contends that the election notice should contain the ordinance in full in order that the voters may be apprised of the exact proposition submitted.

By § 47 of the charter, every ordinance is required to be published in the official newspaper for three days consecutively, within ten days after its passage. After this a thirty days' publication of a notice of election, containing a fair statement of the matters to be voted upon, ought to satisfy all reasonable requirements. The city is not called upon to thrust information upon the electors, but to give them fair notice of what is proposed, and an opportunity to express their will. If they take any interest in the subject of the election it is not unreasonable that they should themselves be at the trouble to become fully informed, and there is little danger that they will fail in that respect.

5. We have but one registration law in this state, which is found in chapter 8, Gen. Stat. Sec. 467 declares that

the provisions of the law shall apply to all elections for municipal and other *officers*; but we fail to find any application of it to elections of this kind. Sec. 9 of the charter requires registration "as provided by the general laws of the state;" and § 13 declares that no person shall be entitled to vote unless he is a qualified elector under the state laws, and has registered "as provided by law." But, there being no state law requiring registration at elections of this character, these provisions of the charter are inoperative, and any elector can vote. The amendments to the registration law passed in 1893 do not affect this matter.

The points of objection having all been resolved in favor of the respondents, it follows that the judgment should be affirmed, and it is so ordered.

DUNBAR, C. J., and HOYT and SCOTT, JJ., concur.

ANDERS, J., not sitting.

[No. 715. Decided March 25, 1893.]

THE DENNY HOTEL COMPANY OF SEATTLE, *Appellant*, v.
DAVID GILMORE, *Respondent*.

CORPORATIONS—ACTIONS TO RECOVER ON STOCK SUBSCRIPTIONS—
EFFECT OF PART PAYMENT

A subscriber to the stock of a corporation does not waive any right to object to the validity of other subscriptions, or to dispute the authority of the corporation to sue, merely from the fact that he has made payment on such subscription, when he has no knowledge as to the validity and *bona fides* of other subscriptions.

Appeal from Superior Court, King County.

Hawley & Prouty, and *Burke, Shepard & Woods*, for appellant.

Frank G. Haddock, and *E. C. Hughes* (*James Leddy*, of counsel), for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—The questions raised in this case are substantially the same as those raised in the case of the *Denny Hotel Company of Seattle v. Schram*, ante, p. 134, the only distinguishing feature being that, in this case, the defendant paid \$500 in response to the first call; and it is urged by appellant that he has therefore waived any right he may have had to object to the validity of other subscriptions or to question the authority of the corporation to sue.

It is stoutly contended by the respondent that he never subscribed for any number of shares of stock, but that his name was attached to the subscription list without his consent and against his express commands, and that he did not ratify the placing of his name to the subscription list after it was brought to his notice; but that he agreed to give, for the assistance of the enterprise, what he felt able to give, but that he would not bind himself to pay anything, and what he did pay was not in payment of shares subscribed for, but purely as a donation.

The evidence on this point is conflicting; but especially in consideration of the rather unusual fact in such cases that respondent's name was not signed by himself, we would hardly feel justified in reversing this judgment on the testimony presented on this point. But even conceding that he paid it on account of the alleged subscription, it was not a relinquishment of any known right, for the testimony shows that the respondent had no knowledge of the character of the subscribers; and, therefore, not knowing his rights, he could not be held to relinquish them.

For the reasons assigned in the *Denny Hotel Company of Seattle v. Schram*, supra, the judgment is affirmed.

SCOTT, ANDERS and STILES, JJ., concur.

HORT, J., disqualified.

[No. 723. Decided March 25, 1893.]

SCHWABACHER BROS. & COMPANY, *Appellant*, v. H. G. VAN REYPEN AND CARMİ DIBBLE, *Respondents*.

HUSBAND AND WIFE—MORTGAGE EXECUTED BY HUSBAND—FORECLOSURE.

Although a mortgage of real estate may have been executed by the husband alone, foreclosure thereof may be had, when the mortgage itself declares that the maker is an unmarried man, and there is little or no testimony showing knowledge on the part of the mortgagee of the maker's marriage.

Appeal from Superior Court, Whatcom County.

Metcalfe, Little & Jurey, for appellant.

Black & Leaming, for respondents.

The opinion of the court was delivered by

HOYT, J.—The rulings of this court in the cases of *Sadler v. Niesz*, 5 Wash. 182 (31 Pac. Rep. 630), and *Nuhn v. Miller*, 5 Wash. 405 (31 Pac. Rep. 1031), are decisive of this case, unless we find from the proofs that the appellant had notice of the fact that the respondent Van Reyphen was a married man at the time the mortgage was made, or had such knowledge upon the subject as would lead a man of ordinary prudence to further investigation in regard to the matter. We have examined the proofs offered by the respective parties upon this question, and are satisfied that the fact of such knowledge or information is not established thereby. To begin with, there is the solemn declaration in the mortgage itself that the maker thereof was an unmarried man. And there is little or no testimony that was actually given at the trial to show any knowledge on the part of the appellant that he was in fact married. Such respondent himself testified in a general way that it must have been understood that he was married, but he failed to enter into details or give any particular conversations when, or by means of which, such knowledge was brought home

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to the appellant. This testimony on the part of such respondent is all there is in the record tending to show such knowledge excepting the fact that there is an admission that a man by the name of Jones would testify that at one time Mr. Goldsmith, then acting for the appellant as its agent, was informed that such marriage existed, but in opposition to this admission is the further one that said Goldsmith would, if present, testify that he never received such information, and that he in no way understood or had any reason to believe that such respondent was a married man.

Respondents have in their brief attempted to make something out of the admission contained in the record that, in the final proof submitted at the time title to the land covered by the mortgage was obtained, said Van Reypen stated that he was a married man, but we are unable to see how the fact that such a statement was contained in such proof in any way tended to bring the matter home to the appellant. It is true the testimony shows that an examination of the records was made by its attorneys before it took the mortgage, but there is nothing to show that they ever saw this final proof, or in any manner were informed of the fact of such marriage.

As this case so clearly falls within the rulings in the two cases above cited upon the other questions involved, it is not necessary that we should say more than that this case, and the apparent deliberate attempt on the part of the respondent Van Reypen to defraud those with whom he had dealt as an unmarried man, well illustrate the necessity of the rule promulgated in those cases.

The judgment must be reversed, and the cause remanded with instructions to enter a decree in favor of appellant for the foreclosure of the mortgage.

SCOTT and STILES, JJ., concur.

ANDERS, J., not sitting.

6 156,
38 70,

[No. 728. Decided March 25, 1893.]

W. D. ROBERTSON, *Respondent*, v. P. A. WOOLLEY *et al.*,
Appellants.

CONTINUANCE—ABSENCE OF WITNESS.

A party to an action cannot be forced to trial the instant the cause is at issue, but is entitled to a continuance, upon a proper showing that the principal witness is absent from the state.

Appeal from Superior Court, Skagit County.

Metcalf, Little & Jurey, for appellants.

Sinclair & Smith, for respondent.

The opinion of the court was delivered by

STILES, J.—We are wholly unable to see why the appellants should not have had a continuance of this case. Their answers were placed on file, without any unreasonable delay, about May 25, 1892, and thereupon the respondent demurred to them, and the demurrer was, on June 7th, sustained as to the second affirmative defense only. Leave was given to plead further upon payment of all accrued costs, and on June 15th an amended answer was filed, to which respondent replied the next day. Appellants then immediately, and before the cause was set for trial, moved for a continuance of the cause to the next regular session of the court upon affidavits showing that the principal defendant, the manager of the business out of which the suit grew, and the person with whom all of the transactions were had, was necessarily, but only temporarily, absent in another state. But the court denied the motion, and, without any cause being shown for the unusual proceeding, ordered the trial to begin immediately. Necessarily, therefore, the appellants did not have a fair trial. It is not necessary that a party to an action should be in

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court with his witnesses, ready for trial, on the instant that the cause is at issue. Until the issues are determined he cannot know what proof will be needed; and in every case such reasonable time after the pleadings are on file should be given the parties as will enable them to make proper preparation. It is useless to appeal to the rule that this court does not interfere with the exercise of the discretion of the superior courts; time to prepare for trial is a matter of right as much as time to plead, and cannot be taken away under any principle of justice. Reference is made to a rule of the superior courts which would have postponed the trial of this cause without any motion, but the rule is not in the record, and we do not base our action to any extent upon it.

DUNBAR, C. J., and HOYT and SCOTT, JJ., concur.

ANDERS, J., not sitting.

[No. 734. Decided March 25, 1893.]

EUGENE W. WAY, *Appellant*, v. JAMES H. WOOLERY, *Respondent*.

COURTS—TRANSFER OF JURISDICTION FROM TERRITORIAL TO STATE
COURTS—COMMITMENT—HABEAS CORPUS.

Under the provisions of the enabling act and constitution of this state, which operated to transfer causes pending in the supreme court of the Territory of Washington to the supreme court of the State of Washington, the state supreme court acquired all the powers of the territorial court under the statutes of the territory, to remand criminal cases to the successors of the territorial district courts for the execution of its judgments.

A commitment directed to the Sheriff of King county in the State of Washington, which directs him to commit a defendant to the county jail in the county of King and Territory of Washington, is sufficient to authorize the detention of the prisoner.

Habeas corpus will not lie to secure the release of a prisoner on the ground that he has been committed under the judgment of the supreme court of the state, until a certain fine and costs are paid, and the judgment for costs is in fact in favor of the Territory and not of the State of Washington, when the commitment does not require the payment of such costs as a prerequisite of the prisoner's discharge.

Appeal from Superior Court, King County.

Winsor & Farwell, for appellant.

J. F. Miller, A. G. McBride, and James A. Haight, for respondent.

The opinion of the court was delivered by

STILES, J.—After the decision of this court in *Way v. Territory*, 1 Wash. 415 (25 Pac. Rep. 461), the cause having been remanded to the superior court of King county, that court on the 17th day of June, 1892, issued its commitment to the sheriff, commanding him to imprison appellant until he pay a fine of \$500, theretofore assessed against him, and costs in the sum of \$20.

This case arose upon a writ of *habeas corpus* issued by one of the judges of the superior court of King county, to examine into the authority of the sheriff to hold the appellant further under his commitment. The court below quashed the writ, on motion of the prosecuting attorney, in pursuance of Code Proc., § 722, without hearing the grounds claimed by the appellant to warrant his discharge. Technically, perhaps, the court erred in refusing to hear the case, since the points raised by appellant were intended to test the question whether or not the superior court of King county was a court of competent jurisdiction to issue the commitment upon which the appellant is confined. But if the procedure of the court was wrong, we do not find that its judgment was so. The gist of the appellant's argument is that, inasmuch as there was nothing in either the enabling act which authorized the organization of the

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State of Washington, nor in the constitution of the state, which in express language authorized this court to remand territorial criminal cases to the superior courts of the state for further proceedings, the superior court had no jurisdiction in this instance, but that if any commitment could be issued by any court it must have been issued by this court.

We shall not enter upon any review or discussion of the several portions of the enabling act and the constitution which operated to transfer causes pending in the supreme court of the Territory of Washington to the supreme court of the State of Washington. They are clear and unmistakable in their language, and the appellant makes no contention that they did not have the effect to give this court jurisdiction to try and determine the former case.

The mistake which appellant makes in this matter is found, we think, in that he overlooks the fact that when this court came into existence and took possession of cases pending in the territorial supreme court, it also acquired all the powers of the former territorial court under the statutes of the territory, one of which was to remand cases to the successors of the former territorial district courts, namely, the superior courts, for execution of its judgments. Therefore, no express language was necessary, either in the enabling act or the constitution, to effect that object.

But, if this were not enough, almost the first thing which the first legislature of the state did was to enact what is contained in § 2 of the Code of Procedure, viz.:

“SEC. 2. The supreme court shall be a court of record, and shall be vested with all power and authority necessary to carry into complete execution all its judgments, decrees, and determinations in all matters within its jurisdiction, according to the rules and principles of the common law, and the constitution and laws of this state.”

Under the laws of this state, which at that time were the

former territorial laws, the prescribed method by which the supreme court carried out its determination in a criminal case was by remanding it to the successor of the territorial court, either for a new trial or for commitment under the former sentence. Cases cited by counsel all go to the matter of transfer of jurisdiction, not to the disposal of cases under jurisdiction acquired by transfer.

A verbal criticism is made of the commitment in that the direction to the sheriff is that he commit the appellant to the county jail in the county of King and *Territory* of Washington. But the caption of the commitment shows it to have been intended for the sheriff of King county in the *State* of Washington, and the absolute direction is that the confinement be in the *said* county. We read the paper as if it were written "King county, Washington," rejecting the words "Territory of," as at that date they had no meaning.

Again, it is claimed that the prosecution of the case transferred to this court should have been in the name of the state rather than in the name of the territory. The title of the case, it is true, remains "*Territory of Washington v. Eugene Way*," but if any objection could have been made upon that account, it should have been made when that cause was heard, and it is now too late to raise the objection.

It is also said that the judgment for costs was in favor of the territory and not in favor of the state. The judgment was for \$22.25, and that execution issue therefor. The commitment, however, does not require that those costs should be paid as a prerequisite of appellant's discharge. Only the costs of the superior court are mentioned therein.

The judgment will, therefore, be affirmed.

DUNBAR, C. J., and HOYT, ANDERS and SCOTT, JJ., concur.

[No. 835. Decided March 25, 1893.]

FRANK A. SMALLEY, *Appellant*, v. WILLIAM H. SNELL,
Respondent.

COUNTY OFFICERS—TERMS OF OFFICE—CONSTITUTIONAL LAW.

A prosecuting attorney holding office under the provisions of art. 27, §6 of the constitution, does not fill such a term as is contemplated by art. 11, §7 of the constitution, which prohibits a county officer from holding more than two terms in succession.

Appeal from Superior Court, Pierce County.

L. C. Branson, Ben. Sheeks, and H. W. Lueders, for appellant.

Charles Richardson, and Charles Bedford, for respondent.

The opinion of the court was delivered by

HOYT, J.—The discussion of this case has extended over a wide range, but in our view of the law a decision of the controversy in question involves but a single point, which must be determined entirely by a construction of the provisions of our constitution. Such being the fact, very little light can be gathered from the large array of authorities which the industry of counsel has brought to our attention.

The controlling question in the case is as to whether or not the term of a county officer, of which he is prohibited from holding more than two in succession, by the provisions of §7 of art. 11, includes the term which such officer held under the provisions of §6 of article 27. If the time of holding under this section constitutes a term within the meaning of said §7, it would follow that such officer could only hold for that time and one full term under the state constitution. And, under the conceded facts in this case,

the respondent would be ineligible to hold the office to which he was elected, for the term commencing the second Monday in January, 1893.

It is argued on the part of appellant that the time an officer served under the provisions of said § 6, was as much a holding under the constitution as though he had been elected to such office by virtue of the provisions thereof. With this contention we fully agree, but it does not at all follow that an officer holding by virtue of such section is filling such a term as is contemplated by said § 7.

Said § 6 is contained in the schedule to the constitution, and though for some purposes such schedule may be held to be a part of the constitution, yet a provision therein contained will frequently receive an entirely different construction from what it would if contained in the body of the constitution. The purpose of the schedule is not to provide a permanent rule of action to control the future government of the state. The main purpose which it is designed to accomplish is to bridge over what would otherwise be a chaotic interregnum between the termination of the organization of the territory and the completion of the organization of the state under the provisions of the constitution.

In our opinion, therefore, the term of office provided for in said § 6 was not in the ordinary and strict sense of the term a part of the machinery for the permanent government of the state, but was rather a temporary arrangement until such permanent provision could be made.

Such being the nature of the office, it follows that an incumbent thereunder, though undoubtedly holding under the constitution in a certain sense, would not in the ordinary sense be holding an office of any particular class under the permanent organization of the state.

This brings us to an inquiry as to the nature of the term which is referred to in said § 7. Sec. 5 in the same article

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makes it the duty of the legislature to provide for the election of county officers, and to prescribe their duties and fix their terms of office. This section being in the same article must be construed with § 7, and when the two sections are construed together, it seems to us clear that the term referred to in § 7 is the term which the legislature is authorized to provide for in § 5, and that said § 7 has no reference whatever to the terms, if such they may be called, of officers holding under the provisions of § 6 of said art. 27. It follows that the term of office of the respondent, commencing on the second Monday in January, 1893, was but his second successive term within the meaning of said § 7 of art. 11.

The judgment of the court below must be affirmed.

DUNBAR, C. J., and STILES and SCOTT, JJ., concur.

ANDERS, J., not sitting.

[No. 554. Decided March 28, 1893.]

PETER PETERSON, *Appellant*, v. HARVEY S. SMITH, *Respondent*.

COUNTY ROADS—APPROPRIATION OF LAND FOR—DAMAGES—CONSTITUTIONAL LAW.

Under art. 1, § 16 of the constitution, private lands cannot be appropriated by a county for road purposes, unless the amount of damages are ascertained in court, in a proceeding instituted for that purpose; and so much of the act of March 7, 1890, relating to county roads, as conflicts therewith is unconstitutional.

Appeal from Superior Court, Skagit County.

Moore & Turner (James A. Haight and C. H. Ayer, of counsel), for appellant.

George A. Joiner, for respondent.

6	163
9	2
32*	1050
36*	1097
6	163
11	430
32*	1050
36*	652
6	163
13	50
6	163
19	358
6	163
26	290
6	163
32	544

The opinion of the court was delivered by

DUNBAR, C. J.—This case involves the regularity of the proceedings of the county commissioners in changing a county road under the provisions of chap. 19, Laws 1890, and also involves the constitutionality of said act, or a part thereof. The question for our consideration is, is the power to condemn land, conferred by said law above cited, consistent with the provisions of the state constitution? Sec. 16, art. 1 of the constitution provides in positive terms that “no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law.” The constitution also provides that, whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public. Under the constitutional guaranty, the owner of the land appropriated in this case by the county could not be compelled to present a claim for damages. He can remain quiet and be assured that before his property is condemned the county must ascertain his damage, and either pay it to him or pay it into court for his benefit; and the amount of his damages must be ascertained in a court, in a proceeding instituted for that purpose, and in which the defendant can appear and make his showing, if he so desire. There

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is, in our judgment, no authority under the constitution for submitting the question of damages to the road viewers, to be arbitrarily passed upon by them. This question has been passed upon by the supreme court of California, in *Weber v. Board*, 59 Cal. 265, under substantially the same statutes and the same constitutional provisions, and it was there held that the constitutional provision was in conflict with the statutory provision, and therefore abrogated it; the constitutional provision having been adopted after the enactment of the statute. We think that decision was right, and therefore follow it.

As this view of the constitutional question involved will result in the final determination of the case, it is not necessary to pass upon the alleged informalities of the proceedings.

The judgment of the lower court will be reversed, and the case remanded, with instructions to dismiss the action, with costs to appellant.

HOYT, SCOTT, STILES, and ANDERS, JJ., concur.

[No. 563. Decided March 28, 1898.]

THE BELLINGHAM BAY LAND COMPANY, *Respondent*, v.
CARM DIBBLE, *Appellant*.

APPEAL—COSTS—EXPENSE OF BRIEF.

The cost of that portion of a brief which is devoted exclusively to a recital of the testimony given on the trial of a cause, cannot be recovered by the successful party as among the costs of appeal.

Appeal from Superior Court, Whatcom County.

On motion by appellant to re-tax costs allowed on appeal.

Harris, Black & Leaming, for appellant.

H. Y. Thompson, and *J. A. Kerr*, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—The appellant moves to re-tax the costs adjudged the respondent in this action insofar as the same applies to the costs taxed for the brief filed by respondent, in that the same are too large, and not in accordance with the rules of this court. Costs were allowed respondent for the brief in the sum of \$175. An examination of respondent's brief, which is a brief containing 174 pages, shows that 120 pages are devoted exclusively to a recital of the testimony given on the trial of the case. The testimony is before the court in the statement of facts, and it is not necessary that it should be again presented in the form of a brief. At all events the losing party should not be called upon to pay for the same. The brief in this case contains about fifty-four pages of proper matter. We think, under the circumstances, that sixty dollars is an ample allowance to respondent for the costs of their brief, and the judgment will be modified to that extent.

HOYT, SCOTT, STILES and ANDERS, JJ., concur.

[No. 802. Decided March 28, 1893.]

W. R. LOTZ, *Respondent*, v. THE COUNTY OF MASON, *Appellant*.

APPEAL—AMOUNT IN CONTROVERSY

An appeal will not lie from a judgment where the original amount in controversy is less than \$200, and does not involve the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute, although the action may be for the recovery of a portion of a stipulated price under a contract which, in the aggregate, exceeds \$200 in amount.

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Concurring Opinion—STILES, J.

*Appeal from Superior Court, Mason County.**C. W. Hartman*, for appellant.*J. E. Sligh*, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—Respondent moves to dismiss the appeal herein, assigning among other reasons, the original amount in controversy, which does not exceed the sum of \$200. Sec. 4 of art. 4 of the constitution of the State of Washington provides that the supreme court shall have appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property, does not exceed the sum of \$200; unless the action involves the legality of a tax, impost, assessment, toll, municipal fine or the validity of a statute.

The original amount in controversy here is less than \$200, being \$108. The action in no way involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. It is true that the determination of the questions presented to the court by the submitted case determines the right of plaintiff to recover other claims amounting in all to more than \$200, but this action was brought for the recovery of \$108, and no judgment could have been obtained in this action for more than that sum.

It seems plain, therefore, that the case falls within the constitutional limitation, and hence the appeal will be dismissed for want of jurisdiction in this court.

HOYT and SCOTT, JJ., concur.

STILES, J. (*concurring*).—I concur in the disposition of this case made by the majority of the court; but I do not

desire to be understood as in anywise agreeing that the plaintiff below, at the time the agreed case was submitted, had any cause of action whatever against the county. The case recites that he had made a contract with the sheriff to publish summons in one hundred and eight delinquent tax cases at \$2.40 each, and that he had completed the publication of but forty-five of them. Not having completed his contract he was *prima facie* not entitled to anything, and his claim for \$108 was properly rejected. A party cannot split a demand and have judgment for part of it, or recover upon an entire contract for the fulfilled portion of it. Especially should no such proceeding be permitted when the effect is to deprive the other party of an appeal.

But in this case the county, by its stipulation, has made it to appear that the contract was severable, and if it has lost its appeal no one is to blame but itself.

ANDERS, J., not sitting.

[No. 872. Decided March 28, 1893.]

N. J. BARTLETT, *Respondent*, v. W. C. REICHENECKER *et al.*, *Respondents*, AND ERNEST ADLER *et al.*, *Intervenors and Appellants*.

APPEAL — DISMISSAL — SETTLEMENT OF STATEMENT BEFORE JUDGMENT.

Where the transcript on appeal in an equity cause shows that the statement of facts was settled before the rendition of judgment, a motion to strike the statement will be granted, on the ground that there is no affirmative showing that all the facts necessary to the complete determination of the cause are before the supreme court.

Appeal from Superior Court, King County.

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Finch, Snook & Finch, for appellants.

Fishback & Hardin, Hughes, Hastings & Stedman, and
Emmons & Emmons, for respondents.

The opinion of the court was delivered by

DUNBAR, C. J.—Respondent moves to strike the statement of facts embraced in the transcript in this case, for the reason that it appears from the transcript that the judgment in said cause was not rendered until after the said pretended statement of facts was settled, and that therefore the certificate of the judge that said statement contains all the material facts in the said cause is incorrect and insufficient.

The transcript shows that the statement of facts was settled in this cause on the 7th day of April, 1892, and that the judgment was rendered on the 17th day of June, 1892. It therefore appears that the statement of facts was settled and certified by the judge before the rendering of the judgment in the cause.

We have universally held that inasmuch as an equity cause is tried *de novo* in this court, it has no jurisdiction to try the cause without all the facts that were before the trial court being before this court, and the statement of facts having been settled and certified before the rendering of the judgment, there is no affirmative showing that all the facts which were necessary to the complete determination of the cause are before this court.

The motion will therefore be sustained.

HOYT, SCOTT and STILES, JJ., concur.

ANDERS, J., not sitting.

[No. 700. Decided March 29, 1893.]

ENGELBERT BAST, *Appellant*, v. CORNELIUS B. HYSOM,
ADELBERT FOLSOM AND D. H. MOORE, *Respondents*.

APPEAL—OBJECTIONS NOT RAISED BELOW—VACATION OF JUDGMENT.

The fact that a petition to vacate a judgment had been filed in a cause subsequent to the denial of a motion to vacate the judgment on the same grounds, cannot be urged for the first time on appeal.

Where judgment has been taken against defendant by default for his failure to answer, the judgment should be set aside when it appears that he has a defense upon the merits of the case and was misled by a statement of plaintiff's attorney that the cause would be tried several months later than the time at which default was taken.

Appeal from Superior Court, Snohomish County.

Bell & Austin, for appellant.

Black & Edwards, for respondents.

The opinion of the court was delivered by

SCOTT, J.—On the 21st day of April, 1892, judgment was rendered by the superior court of Snohomish county in favor of the respondents Cornelius B. Hysom and Adelbert Folsom, against the appellant by default, for the sum of \$1,359. The process in said action was served on appellant on the 31st day of March, 1892. Appellant moved to vacate the judgment upon the grounds that he had not appeared and pleaded within the time prescribed through inadvertence and excusable neglect, and because one of the attorneys for the respondents had represented to him that said cause would not come on for hearing until the June term of said court, and that it would be unnecessary for him to do anything therein before said time. On the 31st

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day of May following, this motion was denied, and upon June 2d appellant filed a petition to vacate said judgment, setting up substantially the same grounds. At the hearing upon this petition the respective parties appeared, and proofs were submitted by each of them, and the court denied the application; whereupon an appeal was taken to this court.

The respondents urge that the appellant was barred from prosecuting this proceeding in consequence of his having previously moved to vacate the judgment on the same grounds. The appellant urges that the reason the court denied his motion was because he had not resorted to the proper proceeding; that, instead of filing a motion in the original cause, he should have proceeded by petition, as he did do subsequently. And he further insists that the respondents cannot now be heard to raise this objection, for the reason that they did not make it in the court below, but went to trial on the merits of the petition. We find nothing in the record to indicate upon what grounds the court denied the motion, but it does not appear that the respondents objected to the petition because said matters had been previously determined on the motion, or that they set up said proceedings as a bar thereto, and the parties did go to trial upon the merits. Consequently the point is not available here.

A number of affidavits were submitted to the court below at the hearing upon the petition, the contents of which it is unnecessary to set forth. If the appellant's claim is maintained, he has a defense upon the merits to said action, and we think the facts are such that the court should have vacated the judgment taken against him by default. According to the testimony of appellant, it appears that but \$200 was claimed of him before suit, and he disputes any liability even for this amount, and the facts alleged by him

show a defense thereto. It also appears from this showing that he was inexperienced in the law, and was under the belief that it was unnecessary for him to appear or plead in said action until the next term of court succeeding its commencement, which would have been in June; and it further appears that he received information to this effect from one of the attorneys of the respondents. Said attorney, while denying the conversation as alleged by appellant, admits that he did have a conversation with him at the time with reference to the suit, which he details, and enough appears therefrom to justify the belief that the appellant understood from what was there said that it was not necessary for him to take any action in the premises until said June term of court. After appellant had notice that judgment had been taken against him, he proceeded with due diligence to have the same set aside and the action reopened. From all the circumstances in the case, we are satisfied that the judgment of the court below, in denying defendant's application to have said judgment vacated, should be reversed; and it is so ordered, and the cause is remanded with instructions to said court to permit the appellant to file an answer to the complaint in said action, and for such further proceedings as may be authorized in the premises.

DUNBAR, C. J., and HOYT and STILES, JJ., concur.

ANDERS, J., not sitting.

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Statement of the Case.

[No. 747. Decided March 29, 1893.]

STAVER & WALKER, *Appellant*, v. C. A. MISSIMER *et al.*,
Respondents.

PROMISE TO FORBEAR SUIT — CONSIDERATION — MAY BE PLEADED
 IN BAR.

An accepted order upon a third person for the payment of a debt not due is sufficient consideration for an agreement to forbear to sue upon a note which is past due.

A promise to forbear to sue for a definite time, where the promise is based upon a sufficient consideration, may be pleaded in bar to an action.

Appeal from Superior Court, Snohomish County.

Action by Staver & Walker against C. A. Missimer and H. W. Illman, copartners, and their wives, to foreclose two mortgages given to secure the sum of \$2,044, evidenced by four notes, each dated November 10, 1890, one for \$500, due March 10, 1891, and one for \$500, due May 10, 1891, one for \$500, due July 10, 1891, and one for \$544, due August 10, 1891. The first note had been paid prior to suit. Defendants admit the amount claimed in the complaint to be unpaid, but allege as an affirmative defense that prior to October 26, 1891, the defendants were further indebted to the plaintiff upon two unsecured notes, one for \$330, due October 1, 1891, and one for \$486.97, due November 1, 1891, and also upon an unsecured open account; that on said 26th day of October, 1891, the said plaintiff entered into an agreement with defendants to take an accepted order for \$1,000 on Eliza J. Blackman and Fannie L. Churchill, to be applied upon said unsecured notes and open account, when paid, and that the time of payment on the notes secured by mortgage should be extended for one year from said 26th day of October, 1891. Plaintiff demurred to said answer on the ground that the same did not state facts sufficient to constitute a good and valid defense

6	173
10	308
32*	995
38*	1116
6	173
23	745
6	173
38	487

to the action. The demurrer was overruled, and plaintiff replied. Upon a trial had before the court, judgment was rendered for defendants. From said judgment, and from the order overruling plaintiff's demurrer, appeal is taken.

Bell & Austin, and *Blaine & De Vries*, for appellant.

Ault & Munns, for respondents.

The opinion of the court was delivered by

DUNBAR, C. J.—So far as the testimony in this case is concerned, it is very conflicting; but, considering all the circumstances in the case, especially the fact that appellant received additional security by the arrangement which was made, and the circumstances under which it was made, we do not feel justified in disturbing the findings of the trial judge who had the witnesses before him in the trial of the cause.

The legal questions are raised by the demurrer to the answer, the appellant contending—(1) That the answer failed to state any consideration for the alleged agreement to forbear to sue; (2) that a covenant not to sue for a limited time cannot be pleaded as a bar to the action.

As to the first proposition, appellant admits that payment of a note before the note becomes due is sufficient consideration for a promise or agreement to forbear to sue, but asserts that an order on a third person, and especially a conditional order, is not payment and in no way changes the relation of the parties until payment thereon is made, except to extend the time of payment until the order is payable. The answer in this case, however, does not set up a conditional order, but alleges that an order was given and accepted, and such an order as was agreed upon by the parties. And so far as the merits of the case are concerned, the order was paid and respondents given credit for the amount.

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The answer also alleges that a portion of the debt was not due. The fact that it would have been due in a short time does not change the principle of law. After the acceptance of this order by Blackman and Churchill, appellant could have maintained an action against them for the amount accepted, and it can make no difference whether the order was taken as absolute payment or as security for an unsecured debt. It is certainly sometimes a very great advantage and benefit to creditors to secure their unsecured accounts, and the value of the consideration is frequently equal to the full value of the debt secured.

“A consideration has been well defined as consisting of ‘any act of plaintiff from which the defendant or a stranger derives a benefit or advantage.’ . . . It is not necessary that a benefit should accrue to the person making the promise; it is sufficient that something valuable flows from the person to whom it is made, or that he suffers some prejudice or inconvenience, and that the promise is the inducement to the transaction.” 5 Lawson, Rights, R. & P. § 2244.

It is alleged in the answer that the promise was the inducement to the transaction, and outside of the benefits flowing to the creditor from the transaction, it is evident that the giving of this order would be something of an inconvenience to business men situated as these respondents were at that time. We think there was a sufficient consideration to support the agreement to extend the time, and the authorities overwhelmingly support this contention.

On the second proposition, it is contended by appellant that the respondents' remedy for a breach of promise not to sue is a claim for damages, and that the agreement cannot be pleaded as a bar to the action. It seems to us that, outside of the fact that proof could only be made of damages which had already accrued at the time of the commencement of the action, and which for that reason would,

in a great many cases, be an entirely inadequate remedy, it is marking out a crooked path for litigants to travel, and one that was in nowise contemplated by their contract.

The law, in construing a contract, adopts rules to ascertain the intention of the parties to the contract, and when that intention is ascertained, if it is a contract which the parties had a right to make, the law will simply enforce it so as to make effective such ascertained intention, and will not make another and a different contract for the parties, and prescribe different remedies and different penalties. In this case the contract was a plain one. The terms were that suit should not be brought for one year. Why should it not be as plainly enforced? If the contract is to be given force at all, it ought to be given the same force as the original contract. There is just as much reason in holding that the defense to an action on a note before it becomes due on the original contract must be confined to a claim for damages, as there is to hold that the defense, where the agreement as to time has been changed, must be so restricted. In each instance it is purely and simply a question of the maturity of the note. No one would have questioned their right under this agreement to take the old notes up and give new ones for the same amounts due one year from date. That was in substance what they did, and directness instead of circumlocution in administering the law ought to be the policy of the courts.

We are aware that there is a great conflict of authority on this question, some cases holding that the remedy is by damages in a separate action, while others, to avoid multifariousness of suits, have been driven to a more inconsistent practice of compelling the defendant to allege his damages in the original action; while still others have enforced the contract that was made by the parties.

The leading case supporting the last practice is *Robinson v. Godfrey*, 2 Mich. 408, where it is pointedly held that the

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promise operates directly upon the original contract and to bar an action brought upon said contract before the time limited expires. The court in that case, in an exhaustive opinion, reviews the authorities and points out the manner in which courts have been misled that have sustained the opposite view; and in referring to the decisions in certain cases sustaining the view that the promise was a bar, viz., *Tatlock v. Smith*, 19 Eng. C. L. R. 94; *Stracy v. Bank of England*, 19 Eng. C. L. R. 232; *Allis v. Probyn*, 2 Crompt. M. & R. 408, says:

“These cases seem to establish the proposition that agreements not to sue, and in the same manner, agreements to extend the credit, operate directly upon the rights and obligations of the parties to the contract, and, as the case may be, destroy or suspend the remedy. Indeed, it seems to us that the opposite view contended for, makes a distinction where none exists, violates all legal analogies, frustrates the real intent of the parties and must make the court an instrument of manifest wrong and injustice.”

To the same effect: *Blair v. Reid*, 20 Tex. 311, and *Leslie v. Conway*, 59 Cal. 442.

In many other cases the right to plead the promise in bar seems to have been unquestioned, the only contention being over the question of consideration. This is a new question in this state, and, being untrammelled by precedent, we feel free to adopt the rule that seems to us to be the most nearly in accord with the general principles of law applied by courts to the construction and enforcement of contracts, and we therefore decide that a promise to forbear to sue for a definite time, where the promise is based upon a sufficient consideration, can be pleaded in bar to the action.

No error appearing, the judgment is affirmed.

STILES and SCOTT, JJ., concur.

HOYT, J., dissents.

ANDERS, J., not sitting.

[No. 776. Decided March 29, 1903.]

FRANCISCA ZINTEK *et al.*, *Appellants*, v. STIMSON MILL
COMPANY, *Respondent*.MASTER AND SERVANT—FELLOW SERVANTS—NEGLIGENCE—NON-
SUIT.

A yard boss of a lumber yard who has entire control of the yard, with power to hire and discharge workmen, and to employ them under his orders, is a vice principal, and not a fellow servant of the men who work under his control and superintendence.

In an action against a mill company for the death of a workman caused by the falling of a lumber pile which had been negligently piled, it is error to non-suit the plaintiffs, when the testimony tends to show that a yard boss had entire charge of the yard and of the piling of lumber, that he hired and discharged workmen, and that they worked under his orders; and that the injury was due to his negligence. (STILES and HOYT, JJ., dissent.)

Appeal from Superior Court, King County.

Turner & McCutcheon, for appellants.

Charles W. Seymour (*Stevens, Seymour & Sharpstein*, of counsel), for respondent.

The opinion of the court was delivered by

SCOTT, J.—This action was brought by the plaintiffs to recover damages of the defendant for negligently causing the death of Alexander Zintek, who was at the time performing labor for the defendant at its mill yard at Ballard, in King county. At the conclusion of the plaintiffs' case, the court below granted a motion for a non-suit, on the grounds that the deceased and one O. C. Nelson, under whom he was working, were fellow servants, and because no negligence had been proven against the defendant.

The evidence shows that the deceased and one John Marzillger, at the time of the injury, were engaged in removing a pile of lumber; and were working under said

6	178
9	306
23*	997
33*	1066
37*	340
6	178
15	255
6	178
9	395
121	337

Mar. 1893.] Opinion of the Court—SCOTT, J.

Nelson, who was then, and had been for a long time prior thereto, yard boss in said mill yard. Near the lumber, which the deceased and Marzillger were removing, was another pile of lumber which had been placed there while Nelson was yard boss as aforesaid. The evidence shows that this lumber had been negligently piled, particularly from the bottom for some distance up, and that it had been carried to a height of sixteen feet or more. After the deceased and Marzillger had nearly removed the lumber from the pile upon which they were at work, a portion of the upper part of this pile which had been negligently constructed, broke off and fell over, and in falling caught the deceased, and injured him so severely that he died from the effects thereof.

There was testimony to show that said yard boss had entire control of the yard; that he hired and discharged workmen, and that the workmen about the yard worked under his orders; and also to show that it was the duty of said yard boss to superintend the piling of the lumber in the mill yard. He performed no labor himself, such as handling lumber, but had charge of the yard, and superintended the workmen and the management of the yard. No claim was made by the respondent in its brief, or upon the argument, that there was any contributory negligence upon the part of the deceased.

It seems to us that the deceased and said Nelson cannot be held to have been fellow servants under the circumstances of this case, by much the greater weight of the authorities. (See 1 Shearman and Redfield on Negligence, §§ 224-226, and cases cited.) And there was proof of negligence upon the part of Nelson sufficient to go to the jury. It was, therefore, error to non-suit the plaintiffs.

The judgment is reversed and cause remanded.

DUNBAR, C. J., and ANDERS, J., concur.

STILES, J. (*dissenting*).—While it did appear in this case that the foreman of the yard, Nelson, hired and discharged men, and also that he directed the men what to do and where to do it, it was nowhere shown that he ever superintended the men in the piling of lumber. The record was entirely silent as to the proper method of piling, and as to who, if any one, gave directions in that matter; nor was there a particle of testimony tending to show that Nelson knew how the lumber which fell upon Zintek was piled, or that he had any means of knowing it superior to those possessed by Zintek himself. In point of fact, Zintek, of all men, had the very best means of knowing just how the pile which fell upon him was constructed, and what the danger was; for he alone took away the lumber, board by board, which supported the fatal pile. He was more than half a day engaged in removing this support, and could not help seeing that the neighboring pile was only a loose heap which might fall at any moment. The effort seems to have been made to show that Marzillger, who was working in the alley-way, could not observe the danger because of the breast-high pile of boards which lay along the alley in front of the other piles; but his inability to see in no way lessened the certainty that, if he had been where Zintek was, he would have seen. Because of these facts I think the judgment of non-suit was right, even though the doctrine of superior and inferior servant has any application to such a case, which I very much doubt.

HORT, J., concurs.

Apr. 1893.]

Statement of the Case.

[No. 756. Decided April 7, 1893.]

KATE TOOTLE *et al.*, *Appellants*, v. THE FIRST NATIONAL
BANK OF PORT ANGELES, *Respondent*.

CORPORATIONS—PLEA OF ULTRA VIRES—WHEN UNAVAILABLE.

Where a banking corporation has received and retained the
benefits of a transaction it cannot set up the plea that the contract
was *ultra vires*.

Appeal from Superior Court, Clallam County.

Action by Kate Tootle, W. E. Hosea, W. W. Wheeler,
Joshua Motter and Frances S. Tootle, partners as Tootle,
Hosea & Co., against the First National Bank of Port
Angeles, to recover the sum of \$783.33 and interest.

The facts are as follows: On April 20, 1891, the Port
Angeles Mercantile Company was indebted in a sum ex-
ceeding \$7,000, included in which sum was its indebted-
ness to plaintiffs, amounting to \$759.38. A portion of the
indebtedness had been guaranteed by the cashier of the
defendant, a national bank. On that date the B. F.
Schwartz Co., a corporation, which was the owner of the
mercantile company, applied to the defendant for a loan of
\$2,500. The defendant loaned the money to the Schwartz
Co., and took therefor the two notes of B. F. Schwartz,
president of that company. Said company, by its president
and secretary, conveyed the property of said mercantile
company, by bill of sale, to said Schwartz, and said
Schwartz, as a part of the same transaction, conveyed the
same by bill of sale to the defendant. The money loaned
was left with the bank and was paid out by it to certain
creditors of the mercantile company, under Schwartz's di-
rection. After these transfers Schwartz remained in pos-
session and control of the property until about June 9,
1891, buying and selling goods and applying the proceeds

6	181
11	416
33*	345
39*	673
6	181
13	310
14	634
6	181
122	180
6	181
39	384

to the payment of expenses and for goods. About that date, and before the notes matured, the defendant notified him that he must pay the notes. Certain creditors of the mercantile company threatened to attach the property, and the defendant bank proposed to all the creditors that it would take the property and pay fifty cents on the dollar of all claims against the company. Schwartz then turned over to the bank all of said property, on the promise of its president in consideration therefor to pay and settle all the debts of said mercantile company, amounting to about \$7,000, including the claim of these plaintiffs, of which the bank had notice. The bank further promised to cancel and return said notes to Schwartz, on which about \$2,000 was still to become due. The property turned over was worth about \$7,000, or \$7,500. The defendant bank sold said property and canceled and returned said notes, but did not pay the other indebtedness. The claim of plaintiffs not being paid, on September 2, 1891, they recovered judgment against the Schwartz company for the sum of \$759.38, and \$28.95 costs, and thereafter issued execution, which, being unsatisfied, became the basis of proceedings supplemental in behalf of the plaintiffs against the bank as debtor of the Schwartz company, which resulted in the court directing plaintiffs to sue the bank to recover upon its indebtedness to the Schwartz company. On the trial of the cause the court, on motion of the defendant bank, granted a non-suit against plaintiffs, from which judgment they appeal.

Ballinger & Ballinger, for appellants.

The opinion of the court was delivered by

DUNBAR, J.—We think there can be no question that the bill of sale of the property of the Mercantile Company was intended as a mortgage to secure the payment of the

Apr. 1893.] Opinion of the Court—DUNBAR, C. J.

notes. This is apparent both from the testimony and from the answer, and the only serious question in the case to consider is whether the bank is bound by the action of its officers in the transaction upon which this suit is based. This fact seems certain from the testimony, viz., that the bank has received property worth about \$7,000, when its claim was only \$2,000. It is not necessary to decide whether or not the contract was *ultra vires*, for it was not immoral; it was fully performed by the other party, and the bank received and retained the benefits, and in such a case the plea of *ultra vires* is unavailing. 2 Morse on Banks and Banking (3d ed.), § 740.

“The doctrine of *ultra vires* as a defense has died so hard that it is well to repeat the proposition which seems to be fully established by the more recent decisions, that where a contract has in good faith been fully performed either by the corporation or the other party, the one who has thus received the benefit will not be permitted to resist its enforcement by the plea of mere want of power. Time and again corporations have been held estopped to plead *ultra vires* to an action on the contract performed by the other parties where the corporation has received the benefit, although clearly beyond its powers.” 2 Beach, Private Corp., § 425.

To the same effect is 2 Morawetz on Private Corporations (2d ed.), § 688, and Green’s Brice’s Ultra Vires, p. 729, note *a*.

The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong. *Railway Co. v. McCarthy*, 96 U. S. 258. This rule is so well established that it is the work of supererogation to quote authorities to sustain it.

While it is not shown that the contract to pay this indebtedness was entered into by resolution of the trustees of the bank, it does plainly appear to our minds from the

testimony that the trustees were in consultation about the matter; that the business was done in the bank, through its president and cashier, the men who practically do the business of the bank; and even if it did not authorize the transaction it has endorsed it by receiving and appropriating the benefits flowing from the transaction, and it would be against conscience and right to allow it to repudiate the contract and still retain the benefits.

We think the plaintiffs made out a *prima facie* case, and were entitled to a judgment thereon, and that the court erred in sustaining defendant's motion for judgment. The judgment will, therefore, be reversed, and the cause remanded for a new trial in accordance with this opinion, with costs to appellants.

STILES, SCOTT and ANDERS, JJ., concur.

HORT, J. (*dissenting*).—I am unable to find from the record that the respondent has received and retained the goods, or that it received any goods in consideration of its alleged promise to pay the debts of the corporation or partnership. I am, therefore, compelled to dissent. I think that the judgment should be affirmed.

6	184
33	401
6	184
37	660
6	184
40	60
6	184
42	137
42	141

[No. 873. Decided April 7, 1893.]

MARY LAWSON, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.

MUNICIPAL CORPORATIONS—LIABILITY FOR INJURIES TO FIREMEN.

A municipal corporation is not liable for the negligence of firemen engaged in the line of their duty.

The apparatus used by a fire company being under the special control and inspection of such company and not of the city, the city cannot be held liable for injuries received on account of the defective condition of the apparatus.

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Appeal from Superior Court, King County.

Tustin, Gearin & Crews, for appellant.

George Donworth, and *James B. Howe*, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—We believe there are no authorities which support appellant's contention that a municipal corporation is liable for the negligence of firemen engaged in the line of their duty. The authorities cited by appellant certainly do not maintain this proposition, but on the contrary most of them assert exactly the opposite proposition, viz., the rule that a municipal corporation is not liable for the negligence of firemen engaged in the line of their duty. This is so plainly the well established rule that it is scarcely necessary to discuss it. See *Dillon on Municipal Corp.* (4th ed.), § 976, and cases cited.

This is all the proposition that is discussed by the appellant, and is probably all the point that could be raised under the pleadings; for while the complaint alleges that the city furnished an unsuitable and defective frame or brace, known as a "deadman," for use in the work in which Lawson was engaged, yet it does not appear very clearly, if at all, that the defective "deadman" was the cause of the accident. But, conceding that it was so stated in the complaint, it is a well known fact that the apparatus used by a fire company is not under the control of the city, but is under the special control and inspection of the fire company, and such city can, therefore, no more be held for the defective condition of the apparatus than it can for its negligent operation by the company.

We think the demurrer to the complaint was properly sustained and the judgment is, therefore, affirmed.

STILES, HOYT and ANDERS, JJ., concur.

SCOTT, J., concurs in the result.

6 186
36 186

[No. 890. Decided April 7, 1893.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK E.
BILES, *Appellant*.

CHALLENGE TO JUROR — ARSON — INFORMATION — DESCRIPTION OF
PREMISES — OWNERSHIP — VARIANCE.

A challenge to a juror for cause should specify the grounds of ineligibility.

An information which charges defendant with the crime of arson in setting fire to "a two-story wooden storehouse building," is sufficiently definite in description, although the lower story only of the building was used as a storehouse, and the upper story as a lodging house.

Where the actual or constructive possession of a building is in a person who is alleged in an information for arson to be the owner, it is no variance if it be proved on the trial that he was in such possession at the time of the offense, although the actual ownership may be shown to be in another.

Appeal from Superior Court, Whatcom County.

J. C. McFadden, and *Fairchild & Rawson*, for appellant.

W. C. Jones, Attorney General, and *Thomas G. Newman*, Prosecuting Attorney, for The State.

The opinion of the court was delivered by

DUNBAR, C. J.—This proceeding was upon an information filed by the prosecuting attorney, charging appellant with the crime of arson. The jury found the defendant guilty as charged. Motion for new trial was denied, judgment was entered, and the case appealed. The appellant alleges as error:

"*First*: Error of the court in allowing evidence to be introduced upon the indictment amended, and not having been resworn to after such amendment.

"*Second*: Error of the court in the impaneling of the jury, duly excepted to.

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“*Third:* Error of the court during the trial concerning the introduction of evidence.

“*Fourth:* Error of the court in refusing to instruct the jury to find a verdict for the defendant.”

As to the first proposition, it is not necessary to discuss it, as the record does not show that any amendment was made. At the commencement of the trial the counsel for appellant objected to the introduction of testimony on the ground that an amendment had been made to the information. What the alleged amendment was does not appear. The court overruled the objection, and the case proceeded. Whether it was overruled because the amendment was permitted by the law, or because it was immaterial, or because there was no amendment, does not appear, and this court is, therefore, unable to determine from the record whether or not any error was committed.

So far as the second alleged error is concerned, we think, in consideration of the plain language used by the legislature in § 339, Code Proc., viz., “If the ballots become exhausted before the jury is complete, or if from any cause a juror or jurors be excused or discharged, the sheriff, under the direction of the court, shall summon from the bystanders, citizens of the county, as many qualified persons as may be necessary to complete the jury,” that the action of the court in this case was in strict compliance with the law, so far as the manner of selecting the jury was concerned.

In regard to the ineligibility of the juror Daniels, the challenge was the general challenge for cause without specifying the cause; and if it be conceded that the juror was ineligible the grounds of ineligibility were not called to the attention of the court, and a defendant cannot keep concealed from the court the ground of objection on which he relies and spring it here for the first time. Although an examination was made of the juror in regard to his resi-

dence, the burden of appellant's objection had been to the manner of the selection, and when the appellant said, "We now challenge the juror for cause," the court answered, "If for the reason that Mr. Daniels was subpoenaed and summoned on a special venire to fill out the regular panel, I will deny the challenge and allow you an exception." No reply was made by the appellant, and the jury was sworn in. It is very evident from the record that this is the only ground of challenge that was brought to the attention of the court, and appellant not having objected on any other grounds must be presumed to have waived any other objection.

The ground of all challenges must be specifically stated. Thompson on Trials, § 98, and cases cited. The better rule, and that sustained by the weight of authority, is that in order to make a refusal to allow a challenge for cause available for the reversal of the judgment there must be a specification of the ground of the challenge. It is not sufficient to declare in general terms that the party objects to the juror, or that he challenges the juror. The cases upon this question are in conflict, but the rule we have stated is the only one that is sustained by principle, and is the only one that is sustained by decisions in analogous cases. Elliott on Appellate Procedure, § 778. The adoption of the other rule would, in our opinion, encourage sharp practice, and tend to defeat the ends of justice, and we, therefore, adopt the rule announced above.

Without further particularizing, we are convinced that no error was committed by the court in the selection of the jury.

Neither do we think that appellant's contention can be sustained, that the building burned was not such a one as was described in the information. The description was "a two-story wooden storehouse building," and the proof shows that that was substantially what it was, notwith-

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standing the upper story had been used as a lodging house. It was a two-story building; the lower story, which was set on fire, was used for a storehouse. There was no communication between the two stories, but they were both under one roof, and as under the Penal Code a separate apartment may be a dwelling house, although the roof covering it also covers a storehouse, so the building in this instance is none the less a storehouse because the same roof protects a lodging house. Bishop on Statutory Crimes, §§ 277-9.

This building was sufficiently described to notify the defendant what building it was he was charged with burning, and when that requirement is met the requirements of the law are met.

The contention that this building was not subject to arson because it had previously been injured by fire is not, in our opinion, worthy of serious consideration.

So far as the question of ownership is concerned, at the common law arson being an offense against the habitation, it necessarily followed that the building burned must be deemed the building of the person in possession, and notwithstanding the fact that our statute, as stated in *McClaine v. Territory*, 1 Wash. 345 (25 Pac. Rep. 453), has also incorporated in the statutes the idea of protection to property, yet the statutes provide in special terms that in the prosecution of cases solely affecting property, that if it be proved on the trial that at the time when the offense was committed either the actual or constructive possession was in the person alleged to be the owner, it shall be sufficient and shall not be deemed a variance. See § 1377, Code Proc.

A thorough examination of the record fails, in our opinion, to discover any error. The judgment will, therefore, be affirmed.

SCOTT, STILES, HORT and ANDERS, JJ., concur.

6	190
13	469
6	190
27	339

[No. 688. Decided April 13, 1893.]

W. F. WHITTIER, WILLIAM FULLER, F. N. WOOD AND
C. M. PLUMMER, *co-partners as* WHITTIER, FULLER &
CO., *Appellants*, v. STETSON & POST MILL COMPANY *et*
al., *Appellants*, AND ROBERT ABRAMS *et al.*, *Respond-*
ents.

MECHANICS' LIENS—DESCRIPTION—MISTAKE IN AMOUNT OF
CLAIM—REMITTING EXCESS.

A lien notice which describes the property as "all of lot 5 in block 9 . . . except the west 20 feet of said lot; and that said building is known as the Brodek-Schlessinger building, and is on the northwest corner of Third and Washington streets, in said city," is insufficient to create a valid lien, when the building also covers, in addition to the tract specified, the south half of lot 6.

Where the owners of adjoining parcels of land jointly construct buildings thereon under contract with the same contractors, and a lien is claimed for glass furnished both buildings by a sub-contractor, who understands that the whole structure is being built by B. & S., while in fact one N. is the owner of a portion thereof, but the claim of lien as made out by his attorneys correctly describes the B. & S. property, and by mistake seeks to charge the same with the glass furnished for N.'s portion, the mistake may, on the trial, be rectified by remitting the excessive claim. (DUNBAR, C. J., dissents.)

Appeal from Superior Court, King County.

Turner & McCutcheon, for appellants W. C. Stetson and Stetson & Post Mill Co.; *Preston, Carr & Preston*, and *W. R. Bell*, for appellants Whittier, Fuller & Co.

Thompson, Edsen & Humphries, for respondents.

The opinion of the court was delivered by

STILES, J.—The respondents Brodek and Schlessinger and one Nugent planned the erection of a building upon land at the northwest corner of South Third and Washington streets, in the city of Seattle. The land embraced lot

5, block 9, in D. S. Maynard's plat, which formed the street corner and fronted sixty feet on South Third street, and 108 feet upon Washington street, and the south half of lot 6, fronting thirty feet on South Third street, and having the same depth as lot 5. The building was thus to be a parallelogram, 90 by 108 feet in size. Of this area said respondents had a lease of all but the west twenty feet of lot 5—a parallelogram of 20 by 60 feet—which was the property of Nugent. The building erected was, on the outside, apparently one building, but, as originally planned, partition walls ran up from the basement to the roof in such a manner as to completely separate the two ownerships. While the plans were in this condition each owner let a contract with builders, Farnum and others, for the erection of his own portion of the building, but subsequently, and before the materials furnished by Whittier, Fuller & Co. were supplied, the several owners and the contractors modified their plans so that the separate character of the two buildings was largely taken away; that is, they removed the basement partition entirely excepting at the rear of Nugent's part; and instead of a brick party wall between the upper rooms a lath and plaster wall was substituted. To guide the contractors and to carry out their new understanding, the owners caused the architect to draw a new set of floor plans which were signed by all parties, and to be attached to the original plans and specifications, after which the building progressed to completion.

The appellants filed lien claims for labor and materials furnished for the Brodek and Schlessinger part of the building only, and this appeal is prosecuted from a judgment dismissing their several complaints in actions for foreclosures. The nature of the cases requires their separate examination and determination.

1. In the matter of the liens of the Stetson & Post Mill Co. and W. C. Stetson, but one point need be noticed.

The lien claims of these appellants described the property as follows:

“All of lot 5 in block 9 of D. S. Maynard’s plat of the town (now city) of Seattle, except the west 20 feet of said lot; and that said building is known as the Brodek-Schlessinger building, and is on the northwest corner of Third and Washington streets, in said city, King county, State of Washington.”

This claim, it will be observed, located the building correctly, and it excluded Nugent’s part; but it did not include within the description of the land sought to be charged the south half of lot 6, which the Brodek-Schlessinger part actually occupied.

The statute requires that the lien claim shall contain a description of the property to be charged with the lien “sufficient for identification.” Gen. Stat., § 1667. And so far as the claim is concerned, no property could be identified with more certainty to a reader of the record copy. It is lot 5, block 9, Maynard’s plat, excepting the west 20 feet of the lot. But the difficulty which the court below found to be insurmountable was, that when the evidence was in it was found that the building covered an additional distinct parcel of land upon which no claim had been filed at all, viz., the south half of lot 6. Appellants see the force of this proposition, and claim to be relieved by the reference to the name of the building and its location at the northwest corner of the two streets. It is said in the lien claim that this building is known as the “Brodek-Schlessinger building,” and to such persons as might have seen it and have been familiar with the locality that would undoubtedly be a sufficient identification, although unless they were also acquainted with the separate ownership of Nugent it would not have informed them that under the same roof, and without any apparent distinction of title, there were, in fact, two buildings, upon one of which no

lien was claimed. It may be doubted, however, whether a mere private building can be said to be fully identified by giving to it the name of its owners. Private buildings are not generally so identified or spoken of, and particularly when it comes to conveyances, incumbrances and the like. The name helps to identify, doubtless; but the name does not individualize such property, as names do in the case of mining claims, for instance, which ordinarily depend upon nothing but their names for identification.

Tredinnick v. Mining Co., 72 Cal. 78 (13 Pac. Rep. 152), was a case where a lien was properly sustained upon the "Red Cloud Mine, situated in the Bodie mining district, Bodie township, in Mono county." The inception of a mining title is usually by means of a location notice, in which the name is the most prominent feature, and all conveyances follow by the name only. A public record, in that case, identified the property in the first place; but there is no such record of buildings.

The location at the corner of the streets also helps to identify, and we do not desire to be understood as holding that such a description, without any designation of a lot or block, would not be a sufficient identification if the quantity of land were also identified, as for example, if the size of the building on the ground were stated.

In *De Witt v. Smith*, 63 Mo. 263, the description was of "lots 19 and 20, in block 2, in Ashburn's addition to Kansas City," and the corner of the street was given. But in fact the block was not block 2, but block 20. Under the facts the clerical error in omitting a figure was held not to invalidate the lien. In *Caldwell v. Asbury*, 29 Ind. 451, the case was something like this one, for the description was "house and lot on the southwest corner of Fourth and Oak streets." A foreclosure upon one lot was sustained, although it was held that the claim was not sufficient to

sustain a complaint against two lots. It does not appear that the house actually occupied a part of the second lot.

But in *Willamette S. M. Co. v. Kremer*, 94 Cal. 205 (29 Pac. Rep. 633), under a statute like ours, in substance, the description was "lot 6, in block 28, of the Heber tract, at the northeast corner of Hope and Eighth streets;" and although the building extended over onto lot 7, the lien was sustained.

In *De Witt v. Smith*, *supra*, there was something upon the record which would have served to warn any one, even though he did not know of the existence of a house, viz., the plat of the addition, at a certain street corner on which the building was said to have been erected. Unless, in that case blocks 2 and 20 cornered at the same street intersection, it would not be likely that a searcher of the record would be deceived. But in *Willamette S. M. Co. v. Kremer*, *supra*, the court, upon the theory of liberal construction, and that the owner was not misled, and regarding the statute as authorizing a lien upon the "property," which it interpreted to be the house, sustained the lien, although no mention was made in the claim of lot 7.

This court has held that a lien upon a building is ineffectual unless the land, or some interest therein, be included in it. *Kellogg v. Littell & Smyth Mfg. Co.*, 1 Wash. 407 (25 Pac. Rep. 461).

Phillips on Mechanics' Liens says, § 379:

"The best rule to be adopted is, that if there appears enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient."

The claim in this case fully meets this requirement, but the trouble with it, and with the rule as applied to it is, as we think, that its very exactness tended to mislead the public.

The lien claimant is not required to give the owner any notice whatever; if he were, it would take very little in any case to satisfy the law. But he is required to make a record of his claim, and the only purpose of such a record must be to give constructive notice to third persons, and not only to those who may have been familiar with the premises during and since the erection of the building, but also to those who may never have seen the premises as well as those who were familiar with them only before the building was erected. As to all such persons it may be admitted that it would be entirely sufficient to simply name the Brodek-Schlessinger building, on the corner of South Third and Washington streets.

But to the last two classes that description added to the designation of lot 5, block 9, would be a complete trap, in case they should become purchasers during the life of the lien. A more sensible and effectual administration of this law could be had if there were some provision by which a claim in such a case could be amended where no one could be injured by it; but we must take the statute as we find it, and in this case neither the actual building nor the land having been described the liens must fail.

2. Whittier, Fuller & Co. furnished all the glass for the building erected by Brodek and Schlessinger and Nugent, jointly. This they did under a sub-contract with one Pierson, who had a sub-contract from the principal contractors for all the glass work. Their agent was misled into supposing that the entire building was owned by Brodek and Schlessinger, by hearing it spoken of as the Brodek-Schlessinger building, and by the fact that Pierson had but one contract for all of the glass work. But their counsel, whom they employed to prepare and file their claim, were aware, through knowledge acquired otherwise, that the Brodek-Schlessinger building proper did not include Nugent's part, so that from the memoranda furnished

them of glass sold for and used in the Brodek-Schlessinger building, they prepared, and, after verification, filed a claim for the whole amount of the glass, which correctly described the Brodek-Schlessinger building and the land upon which it stood. Their lien claim, therefore, covered glass which was not used in the part of the building described, but was used in Nugent's part, a fact which was not discovered until the trial of the action, when the true state of the matter appeared. Upon this the plaintiffs showed very clearly just what glass had, as a matter of fact, been used in the two portions of the building, and asked that they be allowed to remit from their claim the value of the glass used in Nugent's part, and to have a decree for the balance. The whole claim amounted to \$1,589.39, and the sum proposed to be remitted was about \$150.

The court, upon the ground that the glass used in Nugent's part of the building was a non-lienable item, refused to allow the remission, and upon the authority of *Deater Horton & Co. v. Sparkman*, and *Same v. Wiley*, 2 Wash. 165, 171 (25 Pac. Rep. 1070, 1071), sustained an objection to the claim.

In the first case referred to Kemery filed a claim for a debt due another person and assigned to him, for which he could have no lien under the law. Sparkman claimed a lien for labor on lumber and shingles at wages of \$3 per day. In the other case liens upon lumber and shingles were confused in the same way. In none of the shingle cases was it possible to determine, either from the lien claims or the evidence, how much was properly a lien upon the lumber. The rule laid down in these cases went no further than to declare that a demand for which the law gives no lien cannot be confused with one which is lienable without vitiating the whole. The law imputes notice to every one of its terms, and when a claim is asserted for a lien to secure a demand for which no lien is allowed, the act is

presumed to be an advised attempt to take an unlawful advantage of the statute. But it is not so where mere mistakes or inadvertences cause items otherwise lienable to be included in a claim. A fraudulent practice of that kind would render, and many times has rendered, a claim worthless; but there must be either a gross excess of demand over just claim or actual fraud to accomplish that result.

This glass was all lienable. The several owners of the building, by their conduct in making practically one structure of it, opened the way to any one furnishing materials, which were distributed about and used indiscriminately by the contractors, to claim a lien on the whole of it, leaving the owners to settle proportions between themselves. At least it would so seem, although the point is not necessarily in the case for decision. On the other hand, appellants having, as they supposed, furnished glass for the entire building as the property of Brodek and Schlessinger, no less furnished it for the part of the building which actually belonged to Brodek and Schlessinger to the extent they could identify it as having been so used therein.

In the same manner they could have a separate lien upon the Nugent building for the glass which they could identify as having been used in it. Now by the most natural mistake between them and their attorney, when they came to make out their claim they, without any fraud, or attempt to overreach, included the Nugent glass in their claim, a mistake which they voluntarily offered and asked to rectify at the first opportunity after it was discovered. By all means we think they should have been permitted to make the correction.

Upon another ground objection was sustained to this lien claim, viz., insufficiency of description. The land is described twice, and in the first description, on the first page of the claim, it is made to read: "The south one-half

of the lot No. 6 of block No. 9, and the easterly eighty-eight (88) of lot No. 5 in said block No. 9." Obviously a clerical error caused the word "feet" to be omitted after the word "eighty-eight," and this was held to make the whole description bad. The lien is a very long one, and it may be that that fact caused both court and counsel to overlook the fact that on the last page the description is repeated with the word "feet" included; which makes it unnecessary to consider the arguments offered upon that point. Other objections we regard as entirely technical and insufficient. Separate notice of each would render this already lengthy opinion much more so.

The judgment is affirmed, except as to the claim of Whittier, Fuller & Co., who will take a reversal. The cause is remanded to the superior court for a re-trial of the case as to their claim, in accordance with the law as herein held.

HOYT and ANDERS, JJ., concur.

DUNBAR, C. J. (*dissenting*).—Lack of time prevents me from entering into an extended discussion of this case, but, briefly stated, I am unable to distinguish the case of *Whittier, Fuller & Co.* from the case of *Dexter Horton & Co., Bankers, v. Sparkman*, 2 Wash. 165 (25 Pac. Rep. 1070). It makes no difference in principle that the lien in that case was filed on material that the law does not allow a lien on, for the law will not under any circumstances allow a lien on one man's house for material which goes to another man's house, and the material is as much non-lienable under the statute, for the purposes of this case, as though it were *absolutely* non-lienable. I do not think the fact that the same contractor built the two houses, or that the two houses were built with a joint partition wall, affects the case at all. They were two separate contracts, and it devolves upon the material man when he seeks to charge a

Apr. 1893.] Opinion of the Court—STILES, J.

third man's property with a debt due from the contractor, to definitely inform himself as to where the material is used. I think the trial court was justified, under the former rulings of this court, and under the law, in holding that appellants had no lien against respondent's property, and the judgment ought to be affirmed.

SCOTT, J., dissents.

6	199
12	39

[No. 840. Decided April 13, 1893.]

JOSEPH M. LAMMON *et al.*, *Respondents*, v. C. M. AUSTIN,
Appellant.

FORECLOSURE OF MORTGAGE—ATTORNEY FEES.

Although a mortgage may provide for the payment to the mortgagee out of the proceeds of sale on foreclosure, of "counsel fees at the rate of ten per cent. upon the amount which may be found to be due for principal and interest by the said decree" of sale, the mortgagor is not liable to the payment of such counsel fee where, before the expiration of the time for answering in the foreclosure suit, he pays into court the full amount of principal and interest and costs to date. (DUNBAR, C. J., dissents.)

Appeal from Superior Court, Thurston County.

Charles H. Ayer, for appellant.

O. V. Linn, for respondents.

The opinion of the court was delivered by

STILES, J.—This was an action to foreclose a mortgage upon real estate. The note contained no provision for attorney's fees, but the mortgage had the following clause:

"And out of the money arising from said sale to retain the said principal and interest . . . together with the costs and charges of making such sale and of suit for fore-

closure, including counsel fees at the rate of ten per cent. upon the amount which may be found to be due for principal and interest by the said decree."

Before the time for answer expired, the defendant paid into court the full amount of the principal and interest and costs to that date, and demanded a dismissal of the complaint, but the court refused to dismiss except upon payment of the ten per cent. as counsel fees as specified in the mortgage.

Enforcing this contract exactly in accordance with the terms of it as agreed upon by the parties, we think the court below was in error, because the contract only provided for the payment of counsel fees out of the proceeds of the sale. *Stover v. Johnnycake*, 9 Kan. 367; *Wylie v. Karner*, 54 Wis. 591 (12 N. W. Rep. 57); *Monroe v. Fohl*, 72 Cal. 568 (14 Pac. Rep. 514); *Schmidt v. Potter*, 35 Iowa, 426.

The judgment is reversed. Appellant to recover all costs subsequent to the time of his payment into court.

HOYT, ANDERS and SCOTT, JJ., concur.

DUNBAR, C. J. (*dissenting*).—I dissent. I think this contract, reasonably construed, provides for an attorney's fee when the suit is brought, by the strongest kind of an implication. I have no doubt such was the intention of the parties.

[No. 906. Decided April 13, 1893.]

THE STATE OF WASHINGTON, *on the relation of H. L. Tibbals, sr.*, v. THE SUPERIOR COURT OF JEFFERSON COUNTY, STATE OF WASHINGTON.

CERTIORARI—WHEN LIES—GRANTING NEW TRIAL.

Certiorari will not lie to review the action of the superior court in granting a new trial. (SCOTT, J., dissents.)

Original Application for Certiorari.

John Trumbull, and *Smith & Felger*, for relator.

Carroll & Rohde, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—The question presented in this case is: Can the act of a trial court in granting a new trial be reviewed by *certiorari*. The authorities cited by petitioner throw no light upon the subject. It is contended that the court acted without jurisdiction because the grounds upon which the new trial was granted were not the grounds set out in the petition. But this position is not tenable. The court certainly had jurisdiction to grant a new trial, and if it granted it on illegal grounds it simply committed error. The granting of a new trial is a matter which is generally conceded to be largely discretionary with the trial court, and if this discretion has been abused, and a new trial has been granted outside of the provisions of the law, we see no reason why the error, if properly excepted to, could not be preserved in the record and brought here for review in the event of a new trial resulting against the interests of the petitioner. If it does not so result, of course in theory of law there has been no prejudicial error. In any event we are unable to find any authority for issuing a writ in such a case, and the petition is, therefore, denied.

HOYT, STILES and ANDERS, JJ., concur.

SCOTT, J., dissents.

[No. 697. Decided April 14, 1933.]

PETER PEDERSON, *Respondent*, v. SEATTLE CONSOLIDATED
STREET RAILWAY COMPANY, *Appellant*.

EVIDENCE—RELEASE—BURDEN OF PROOF—NEW TRIAL.

An allegation by a plaintiff that his signature to a written release exempting defendant from liability for injuries received through the latter's negligence was secured from him by fraud is not sufficiently supported by proof on plaintiff's part that he was misinformed as to the contents, and did not understand the nature of the paper he signed, while three witnesses, who were present at the time, testify that the release was read over and explained to plaintiff twice before he signed it, and that he then said he understood it; especially in view of the fact that the burden of proof is upon plaintiff, and the other testimony in the cause tends to corroborate defendant's side of the issue.

A new trial may be awarded, although the verdict be supported by some evidence, where it appears that the evidence is insufficient to justify the verdict.

Appeal from Superior Court, King County.

Julius F. Hale, and W. T. Scott, for appellant.

Thompson, Edsen & Humphries, for respondent.

The opinion of the court was delivered by

ANDERS, J.—On September 16, 1891, at about eight or nine o'clock in the forenoon, the respondent entered upon one of the appellant's electric street cars in the city of Seattle, to ride to North Seattle. Before reaching the destination of the respondent, and when on Front street about fifty feet north of Blanchard street, this car, while going down an incline, collided with a wagon belonging to the appellant which was standing on the track in charge of two men, who were upon a scaffold erected upon the wagon, engaged in repairing the trolley wire. It was an open car and the respondent was sitting on the second seat from the

6	202
9	247
33*	351
34*	666
37*	298
6	202
16	297
16	315
17	479
6	202
435	445
435	446

front. Before the car reached the wagon, the respondent, thinking there was going to be a collision, became greatly excited and jumped off the car and fell upon the ground with such force that the result was an "extra capular" fracture of the right hip. Soon after the accident happened, the respondent, at the suggestion of Dr. Coe, who was a physician and surgeon for the railway company, was conveyed to Grace Hospital where his injuries were treated, and where he was taken care of for a period of six and one-half months at the expense of the appellant. Subsequently to his discharge from the hospital, the respondent brought this action for damages, and alleged in his complaint that the injury therein mentioned was caused by the negligence and carelessness of the railway company in causing its construction wagon to be upon its track, and in propelling its car against the same, whereby he was thrown with great force and violence from said car upon the street. The answer of the appellant was—(1) A denial of negligence; (2) an allegation that if the respondent was injured it was by reason of his own negligence; and (3) that the respondent, on the 16th day of June, 1891, in consideration of the payment of certain expenses for the respondent by the appellant, which the latter then and there assumed to pay and did pay, entered into an agreement in writing whereby he released and discharged the appellant from any obligation growing out of said alleged injuries. The respondent, in his reply, admitted signing the release, but alleged that at the time of signing the same he did not know or understand its purport; that he did not and could not read the same at the time he signed it; that said instrument was not read or explained to him by any one; that he was not then or at any time informed that the effect of signing the said instrument was a waiver of his claim against the appellant for damages; that, by reason of the condition of his mind and body at the time, he was incapable of comprehending

the import or meaning of said instrument, and that the same was procured from him through the fraud and artifice of the appellant, with the intent on the part of appellant to defraud him out of his just claim against the appellant for compensation and damages for said injuries. A trial was had by a jury, resulting in a verdict for plaintiff for \$2,000, for which sum, after overruling a motion for a new trial, the court rendered judgment.

Upon the issues raised by the pleadings in this case, it was incumbent upon the respondent, in order to succeed, to establish two facts: *First*, That the appellant was guilty of negligence proximately causing the injury of which he complains; and, *second*, that the release which he signed was procured by the fraud and artifice of the appellant, or that, by reason of his mental condition at the time, he was incapable of comprehending and understanding what he did, or the effect of his act.

The first ground of error assigned by the appellant is that the evidence is insufficient to justify the verdict in both of these particulars. We will examine the latter proposition first for the reason that if the proof is not sufficient, under the well recognized principles of law, to support the finding of fraud, a new trial must be awarded, although, as matter of fact, the appellant was guilty of the negligence charged in the complaint. As a general rule the presumption of law is that men act honestly and not fraudulently. And, hence, where fraud is alleged it must be clearly and satisfactorily proved by him who alleges it. Upon this subject Mr. Bigelow, in his valuable work on Fraud, at page 123, says:

“The burden of proof in regard to an allegation of fraud, coming either from the plaintiff or from the defendant, rests upon the party who makes it. If the plaintiff's case, originally or on replication, is that the defendant has defrauded him in a particular transaction, or that the defendant is in privity with one who has defrauded him, the

burden of proof is upon the plaintiff; he must prove the fraud, which means that he must show it by clear and satisfactory evidence, such as will preponderate over presumption or evidence on the other side. If on the other hand the defense to a suit is that the plaintiff defrauded the defendant in the supposed cause of action, or that the plaintiff is privy to one who defrauded him, the burden of proof is upon the defendant; he must prove the fraud, which means the same thing as when the burden rests upon the plaintiff."

Where the purpose is to set aside a deed or to impeach a written instrument on the ground of fraud, by oral testimony of a party to the instrument, the rule above stated is especially applicable, and is rigidly adhered to by the courts.

In *Parlin v. Small*, 68 Me. 289, where the claim set up by the plaintiffs was that, in purchasing a farm, they were defrauded by the defendant conveying a less amount of land than was bargained and paid for by them when they took their deed, when the plaintiffs undertook to establish the alleged fraud entirely by their own testimony, the court said: "The plaintiff must prevail, not only upon a preponderance of evidence, but such preponderance must be based upon testimony that is clear and strong, satisfactory and convincing."

In *Gruber v. Baker*, 20 Nev. 453 (9 L. R. An. 302), the supreme court of Nevada, in speaking of the amount of evidence required to establish fraud, used this language:

"What amount or weight of evidence is sufficient proof of a fraud is not a matter of legal definition. The proof, however, must be satisfactory. It should be so strong and cogent as to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest. It need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference

of fraud may be drawn. As an allegation of fraud is against the presumption of honesty, it requires stronger proof than if no such presumption existed."

In the case of *Rose v. West Phila. Ry. Co.* (Pa.), 12 Atl. Rep. 78, was an action for negligence, charging that the defendant had, in operating its street car, run against and injured the plaintiff. One of the defenses relied on was a release, signed by the plaintiff, and the claim of the plaintiff was, as here, that he did not know what he was signing; in other words, that misrepresentations were made to him, and that he did not know he was giving up his rights to a certain portion of the claim. In charging the jury with reference to the release, the trial court instructed them that the release was not to be set aside upon any but the strongest and clearest testimony; that to infer fraud from anything but the strongest and most satisfactory proof is to infer a criminal thought or disposition in a man, which is against the presumption of law. This charge of the court was held by the supreme court of Pennsylvania, on appeal, to be "obviously correct."

Keeping in view the rule of law enunciated in the above authorities, and many others that might be cited, and applying it to the case now before us, the question to be determined is, was the proof sufficient to invalidate the release on the grounds alleged by the respondent? In an early case in our territorial supreme court it was said, in effect, that courts should be reluctant to set aside a verdict where there is evidence to support it, or the evidence is of doubtful interpretation (*Gove v. Moses*, 1 Wash. T. 7), and that rule has, so far as we are informed, been substantially followed ever since. But we do not understand the law to be that a verdict should be set aside only in those cases where there is no testimony whatever to sustain it. Insufficiency of the evidence to justify the verdict is made a ground for a new trial by our statute; and that would seem to imply

that, in proper cases, a new trial may be awarded although the verdict be supported by some evidence.

But as a general rule a verdict should not be disturbed where there is any substantial conflict in the evidence upon which it is based, and this court has so held in numerous instances. It is the province of the jury to determine the weight of the evidence; and after they have done so, and the trial judge who has seen and heard the witnesses and observed their demeanor on the witness stand, and has thus formed an opinion as to their credibility, has sustained their verdict on motion for a new trial, the appellate court ought to be slow to molest the finding. But if, on due consideration of the evidence, it appears that the verdict is not supported by any substantial proofs, it ought to be promptly and unhesitatingly set aside, and a new trial ordered.

Now, what is the proof in reference to the signing of the release in question? The respondent testified that he was a Norwegian by birth, and had resided in this country nine years; that he could understand and speak the English language but that he could not write in that language, except his name; that his vocation was that of a brick mason, and that he understood the business well and had worked around Seattle for eight years; that right after he received the injury complained of he was taken to Grace Hospital, but by whom or at whose suggestion he did not know; that his injury was treated by Dr. Coe, and that he was able to be around on crutches in ten weeks, but that he remained at the hospital for six months and a half. He further testified that he paid nothing either for his medical treatment or his care at the hospital, and was never asked to pay any bills, and did not know who paid them. He further says that Dr. Coe bandaged his hip about four o'clock in the afternoon of the day on which he was hurt, and thereafter attended him at the hospital. The witness

denied having ever made any agreement to release the appellant from all damages in case it would pay his hospital expenses and physician's charges; and said he did not know that the paper he signed was a release, but thought it was "some regulation of the hospital, or something," but could not tell what it was. While he does not deny that a paper was read to him by Dr. Coe, in presence of Mrs. Tremaine and Dr. Weed, he asserts it was not the paper he signed, and that the language used in the release was neither explained nor read to him, and that if the words therein found had been read or stated to him he would have understood them. He does not claim that he did not understand what was explained and read to him, and yet he is not able to say what it was further than that it was something concerning the hospital, some regulation or something. As to why he signed the paper, he states that "they came with a piece of paper and told me to sign it." His testimony further shows that Dr. Coe told him, between Christmas and New Year, that he had heard that he, the respondent, was going to sue the company, and that the doctor then stated to him if he was going to do so he wanted him to get out of there, or words to that effect, but that the doctor said finally he might stay till the first of January, and he remained until that time. The above is substantially all the testimony on the part of the respondent pertinent to the execution of the release. Now, taking it all together, all that was said as well as all that was done by the respondent, we hardly think it sufficient to overthrow the presumption that the appellant acted honestly in procuring the release, even if there had been no testimony on the other side.

It is difficult to believe that the appellant would have paid respondent's medical and hospital expenses for so long a time without some agreement or understanding in regard to the matter, or without some special reason for so doing;

and it is equally difficult to understand why the respondent during all of that time made no inquiry and did not do anything to ascertain the amount of his expenses or by whom they were to be paid, if he had no agreement or understanding with anybody with regard thereto.

On the part of appellant we have the testimony of three witnesses—Dr. Coe, Dr. Weed and Mrs. Tremaine—who were present at and before the time when the release was signed by the respondent, and they state positively that it was read over and explained to respondent twice before he signed it, and that he then said he understood it. Two of these witnesses, Dr. Coe and Mrs. Tremaine, signed the instrument as witnesses. In fact, the appellant's witnesses say the agreement was made and thoroughly understood by the respondent before it was reduced to writing.

It appears that Dr. Coe was a passenger on the same car on which the respondent was riding at the time the accident occurred, and that he went with the respondent to the drug store where he examined him to ascertain the extent of his injuries. At first the doctor advised him to go home, but on further examination concluded that it would be better to have him taken to the hospital for treatment. After the respondent arrived at the hospital he expressed no desire to send for any other physician, and so Dr. Coe took charge of the case. But he testifies that before doing so, he desired to know something as to how or by whom his charges and the hospital expenses would be paid; and that finding that the respondent, as he said, had no money, he then remarked to him that the company would pay his expenses, provided he would release them from all further liability, to which the respondent assented, and in that way the question of the release arose. We have carefully examined all the evidence upon this branch of the case, and we are of the opinion that it is not sufficient, under the law governing the character of proof required in such cases, to justify

the conclusion that the release was obtained by artifice or fraud, or that the respondent was unconscious of what he was doing when he signed it. In the language of the supreme court of Nevada, in *Albion, etc., Mining Co. v. Richmond Mining Co.*, 19 Nev. 225 (8 Pac. Rep. 480): "The verdict of the jury cannot be sustained upon any impartial, rational or intelligent consideration of the evidence as set forth in the statement on appeal."

We think the learned judge before whom this cause was tried committed error in modifying the appellant's fifth request to charge the jury, by striking out the following: "The burden of proving that, at the time of executing the release referred to in defendant's answer, the plaintiff did not have any understanding or information as to the effect of the paper which he was signing, is upon plaintiff." As we have already intimated, the plaintiff was called upon to establish the invalidity of the release, and the burden of proof was therefore upon him.

The appellant objects to instructions numbered 1, 2, 3 and 4, requested by the respondent and given to the jury by the court, and claims that they are argumentative; that they entirely ignore the defendant's theory of the case, and give undue prominence to that of the plaintiff, and to the evidence introduced by it. We think the objection cannot be maintained. No portion of the evidence is therein specifically mentioned or alluded to, and the instructions seem to be substantially in accordance with the law.

But we are of the opinion that the court should have given to the jury some direction, or rule, by which they should be guided in determining the question of damages; but as a more specific charge than that given by the court was not requested by the appellant, we would not be inclined to reverse the judgment on that ground.

Instruction number three, asked by appellant and re-

fused by the court, is faulty in this, if nothing else, that the appellant thereby asked the court to instruct the jury to find for the defendant, regardless of whether its servants in charge of the wagon, as well as those managing the car, used proper care and diligence to avoid the accident, and the court properly declined to submit it to the jury.

The judgment of the lower court is reversed, and the cause remanded for a new trial.

HOYT and STILES, JJ., concur.

SCOTT, J., concurs in the result.

DUNBAR, C. J. (*dissenting*).—I dissent. The testimony, to my mind, shows clearly—(1) That the agent of the company in charge of the matter was guilty of gross negligence; (2) that the respondent was not guilty of contributory negligence; (3) that undue advantage was taken of the respondent to obtain the release which the appellant pleads in defense.

I do not question the law pronounced at great length in the majority opinion, but I assert that it does not govern this case. The opinion does not state the circumstances under which it is alleged the release was obtained. While this man was lying mangled and shocked by the injury, before his wounds were dressed or his mind composed, the agents of the company obtained this so-called release. The undisputed testimony shows such a condition of mind and body as would render absolutely farcical any attempt of the respondent to enter into a contract concerning important rights. Courts would not hesitate to set aside a contract urged and procured by a private individual under such circumstances as are proven in this case; and no different rule should be prescribed for a corporation.

Contracts, when they are honestly and fairly entered into, must be rigidly maintained and enforced by the

courts; because contracts, express or implied, are at the bottom of all business relations. But a contract is only entitled to respect from the presumption that the contracting parties were standing on an equal footing at the time the contract was entered into. Will any man assert that the parties to this action were on an equal footing at the time this contract was entered into? Here was a man without means and without friends, torn and bruised by an accident, and jolted and shocked until he was prostrated; his wounds not yet examined to ascertain if they were fatal, racked with physical pain and scared out of his wits by the misfortune that had overwhelmed him; and while in this condition, a condition of mind and body absolutely preventive of intelligent calculation, the company with unseemly haste thrust this cold, calculating stipulation into his face and obtained his signature to it. The essence of a contract is an agreement of the minds of the parties; or the consent and harmony of their intentions. The circumstances under which the respondent's signature was obtained to the so-called release shows, indeed, no want of harmony; but it was unilateral harmony; there was but one mind operating; the mind of the respondent was plainly in no condition to agree to anything; and appellant should not be allowed to shelter itself behind an instrument obtained in such a way.

The judgment should be affirmed.

[No. 746. Decided April 14, 1893.]

EDWARD J. DWYER, *Respondent*, v. HENRY RABORN, *Appellant*.

REAL ESTATE BROKERS—COMMISSIONS.

Where land is placed in the hands of a real estate broker for sale on certain terms, and the broker introduces to the owner prospective purchasers, who refuse to buy the land on such terms, but take an option on it for sixty days, the broker is not entitled to any commission.

Appeal from Superior Court, Snohomish County.

Bell & Austin, for appellant.

Frater & Coleman, and *Hawks & Heffner*, for respondent.

The opinion of the court was delivered by

HOYT, J.—This action was brought to recover compensation alleged to be due under a special contract between the plaintiff and the defendant, by which it was agreed that if the plaintiff would negotiate a sale for the defendant of certain lands, upon terms then agreed upon, the defendant would pay him for his services in so doing the sum of \$500. The question presented to the jury was as to whether or not there had been a substantial compliance with the terms of the agreement upon the part of the plaintiff.

Much of the discussion in this court has been upon the question as to the liability of an owner of property to a real estate agent who has had the property for sale upon certain express terms, and, in his attempt to make a sale thereof in accordance with such terms, has brought the owner and certain persons together, and the owner has made a sale to such persons upon terms somewhat differ-

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ent from those upon which the agent had had it for sale. But in view of the proofs shown by the record, such question is not in this case. There was no proof that a sale had been consummated. The plaintiff introduced in evidence two certain instruments in writing, and, aside from what is shown by them, there was absolutely no proof that the persons introduced by the plaintiff ever bought, or were ready and willing to buy, the lands, upon the terms upon which they were given to plaintiff to sell, or upon any terms whatever. The learned judge of the court below construed the contract entered into on the 12th day of May as a binding contract for the sale of the property, and instructed the jury to that effect, and if the instruction based upon such contract was correct there could probably be little fault found with his other instructions. The theory upon which he allowed the case to go to the jury was founded upon such construction of said contract, and all other questions were largely incidental to that principal one. We have carefully examined said contract, and are unable to construe it as did the court below. In our opinion it simply gave, to those proposing to purchase, an option upon the lands, for the period of sixty days, for the sum of \$500, and that they were in no manner bound by said contract to take the land at the price agreed upon, or at any other price. The only liability which they incurred, under the terms of the contract, was the forfeiture of said \$500. It follows that the making of said contract between the defendant and the persons introduced by the plaintiff in no manner effected a sale of the land.

What has been said as to this contract is equally true as to the other one offered in evidence, and, as we have already seen that there was no other evidence in the case tending to show such a performance of the conditions of the contract on the part of the plaintiff as would entitle him to his compensation, there was nothing upon which the case should

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have been submitted to the jury. If the court had been asked to instruct the jury to return a verdict for the defendant, it would have been error to have refused such instruction. But as no such request was made we cannot now finally dispose of the case, and can only reverse the judgment, and remand the cause for a new trial.

STILES, SCOTT and ANDERS, JJ., concur.

DUNBAR, C. J.—I think the judgment of the court below was right and should be affirmed.

[No. 862. Decided April 14, 1893.]

THE FIRST NATIONAL BANK OF SEATTLE AND FRED
BENSE, *Appellants*, v. JAMES H. WOOLERY, *Sheriff*,
AND HENRY BODE, *Respondents*.

CHATTEL MORTGAGES—SALE BY HOLDER OF ONE NOTE—WHAT
TITLE PASSES—DISTRIBUTION OF PROCEEDS.

Where one chattel mortgage is given to secure three promissory notes to different parties, and the holder of one of the notes, under the power of sale contained in the mortgage, has the entire property sold without the holders of the other notes being made parties thereto, the entire title to the property passes to the purchaser, and all the mortgagees are entitled to share *pro rata* in the proceeds of the sale.

The fact that the property was purchased at the foreclosure sale in the interest of the note holders who had no part in instituting the proceeding, does not estop them from maintaining an action to secure a *pro rata* distribution of the fund arising from such sale.

Appeal from Superior Court, King County.

Action by the First National Bank of Seattle and Fred Bense against James H. Woolery, as sheriff, and Henry Bode, praying an injunction to restrain the sheriff from

paying over to defendant Bode the amount realized on a foreclosure sale of certain mortgaged personalty, on the ground that plaintiffs, who had been secured by the same mortgage on certain other notes, were entitled to a *pro rata* share of the proceeds, and praying the court to distribute the fund arising from said sale *pro rata*. On the final hearing the cause was submitted to the court on an agreed statement of facts, the plaintiff reserving objections to certain facts. The court dismissed the plaintiff's action, holding that the effect of the sale was to convey an undivided interest in the mortgaged property and that plaintiffs' mortgage still remained a lien upon the mortgaged property, and could be enforced against the same. From such judgment plaintiffs appeal.

Struve & McMicken, and *James Kiefer*, for appellants.

Burke, Shepard & Woods (*Charles E. Shepard*, of counsel), for respondents.

The opinion of the court was delivered by

HOYT, J.—The decision of this case must turn entirely upon the construction which is to be given to the power of sale contained in a certain chattel mortgage set out in the record. Such chattel mortgage was given to secure the payment of three several promissory notes, all of the same date, and maturing at the same time, but executed to different parties. A sale of the entire property was had at the instance of the holder of one of the notes without the holders of the other notes having been in any manner made parties thereto.

Under these circumstances what kind of title was passed to the purchaser at such sale? It is argued upon the part of the respondent Bode that only such a proportionate interest thereof was passed as the note held by him bore to the entire indebtedness secured by the mortgage. On

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the other hand the appellants contend that such sale, whether made at the instance of one, or all, of the holders of said notes, passed the entire title to the property, and must be held to have been made in the interest of all of such holders. It is evident that if either one of the parties interested in said mortgage had sought to foreclose the same in a court of equity, it would have been necessary that he should have made all interested parties to the action, and any sale of the property decreed by the court would have passed the entire title, and the proceeds of such sale would have belonged proportionately to the holders of all the notes. If this is so, it is because there being but one mortgage the mortgagors could not rightfully be called upon to respond to several distinct foreclosure suits. But if this is true as to a foreclosure in equity, it should also be true as to a foreclosure under the power of sale contained in the mortgage. The object of the insertion of such power of sale was to enable the mortgage to be foreclosed and the interest of the mortgagors in the property divested without a suit in equity. There was only one power of sale and that was inserted for the benefit of all the note holders. It cannot, with reason, be said that each of the note holders held a separate mortgage upon such an undivided interest in the property as the note held by him bore to the entire amount thereby secured. There was but one mortgage, and that covered all the property. And if the machinery of the law had to be set in force to foreclose the same, it must be thus set in force as to the whole of the mortgage and the entire interest of the mortgagors in the property. It would be no more competent for the holder of one of the notes to thus separately foreclose as to any particular interest in said mortgage and property than it would have been for him to have gone into a court of equity and asked that an undivided interest in said mortgage and property be foreclosed for his benefit.

We must, therefore, hold that the foreclosure instituted by the respondent Bode was a foreclosure of the mortgage as a whole, and upon the entire interest of the mortgagors, or those holding under them, in the property. From which it will follow that any sale made thereunder would, under ordinary circumstances, convey to the purchaser the entire interest that the mortgagors had in the property at the date of the mortgage, and that the proceeds of such sale would be held by the sheriff who made the sale, or the note holder at whose instance it was made, for the benefit of himself and the other note holders in proportion to their interests.

Does the fact that at the sale the property was purchased in the interest of the other note holders change this general rule? We see no reason whatever for holding that it does. We know of no reason why the note holder instituting the proceeding could not himself become a purchaser at the sale without waiving any of his rights growing therefrom, and if he could become such purchaser it seems clear that the other note holders might do the same. There is nothing in the case, as we see it, which tends in any manner to estop the plaintiffs from maintaining this action. There was no notice of any reservation at the time of the sale, and the entire property was put up and sold. We are unable to see how the fact that the purchase thereat was made in the interest of these plaintiffs could in any manner injure the defendants. The facts of the case show that the sale was an open one, and everybody, including the defendant Bode, had an opportunity to bid. In our opinion the plaintiffs were not estopped by their acts from asserting their rights to the proceeds of the mortgaged property, nor do we think that by making such purchase they in any manner became the agents of the respondent Bode. But if they did, we do not think that such fact would constitute a defense in this action. If, by reason

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of any such constructive agency, they now hold the property or any interest therein for the benefit of the respondent Bode it is competent for him to compel a sale thereof and a division of the proceeds, but that fact would not prevent the plaintiffs from asserting their rights to the money in the hands of the respondents derived from the sale under the foreclosure proceeding.

This discussion, although not covering all of the questions argued by the respondents, does, in our opinion, cover all that are reasonably involved in the case made by the statement of facts contained in the record. In our opinion, the objections of the plaintiffs to the 8th, 9th, 10th, 13th, 14th and 15th paragraphs of said statement of facts were well taken, and that the facts contained in these paragraphs were immaterial and could have no effect upon the merits of the controversy, and what we have said is enough to determine all the questions raised by the other paragraphs.

The judgment must be reversed, and the cause remanded with instructions to divide the funds derived from the mortgage sale among the several note holders in such proportions as the amount of their respective notes bears to the amount of the entire indebtedness.

DUNBAR, C. J., and ANDERS, J., concur.

SCOTT, J., dissents.

STILES, J.—I concur in the disposition of the case made by the foregoing opinion. But in my judgment the sale was a void one, because the mortgage did not authorize either mortgagee to sell either a part or the whole of the property for his own debt alone.

[No. 908. Decided April 14, 1893.]

THE CITY OF PORT TOWNSEND, *Appellant*, v. JOHN F. SHEEHAN, *Respondent*.

TAXATION—ASSESSMENT IN UNCLASSIFIED CITIES.

The act of March 9, 1893, entitled "An act to provide for the assessment and collection of taxes in municipal corporations of the third and fourth class in the State of Washington," does not apply to the city of Port Townsend, as the latter has not become a classified city under the laws of the state.

The assessor of the county of Jefferson is not authorized by the general revenue law approved March 15, 1893, to make the assessment for the city of Port Townsend, as a part of his duties as such county assessor.

Appeal from Superior Court, Jefferson County.

Del Cary Smith, for appellant.

Robert W. Jennings, for respondent.

The opinion of the court was delivered by

HOYT, J.—Two questions are presented by the appeal in this case. *First*, Does the act of March 9, 1893 (Laws, p. 171), entitled "An act to provide for the assessment and collection of taxes in municipal corporations of the third and fourth class in the State of Washington, and declaring an emergency," apply to the city of Port Townsend? *Second*, If it does not apply, is the assessor of the county of Jefferson authorized by the general revenue law approved March 15, 1893 (Laws, p. 323), to make the assessment for said city, as a part of his duties as such county assessor?

The first question must be decided in the negative upon the authority of the case of *Rohde v. Seavey*, 4 Wash. 91 (29 Pac. Rep. 768). In that case we held that the city of Port Townsend was not a classified city under the general

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laws of the state. We have seen no reason to change the views then expressed, and as there is nothing in said act of March 9th to show any intention on the part of the legislature to include cities not provided for by such classification, it follows that said act can have no force so far as said city is concerned.

As to the other question, it seems clear to us that there is no sufficient direction to the county assessor contained in said act to authorize him to perform the duties of assessor of such city. The only sections which seem in any manner to relate to an assessment for municipal purposes are the first, which in general terms provides a basis of taxation for municipal as well as for all other purposes, and the ninety-fifth, which provides the form of the assessment roll, in which a blank is provided for the insertion of the amount of the city tax. But these provisions alone, when unaided by any of the provisions of the act of March 9th above referred to, do not sufficiently point out the machinery for so doing to authorize the assessor of the county to make an assessment of the city which will be available for city purposes.

It follows that the action of the court in quashing the temporary writ of mandamus was correct, and its judgment must be affirmed.

DUNBAR, C. J., and STILES and ANDERS, JJ., concur.

SCOTT, J., not sitting.

[No. 834. Decided April 15, 1893.]

B. F. RODERICK AND ELLEN W. RODERICK, *Appellants*,
v. A. SWANSON, *Respondent*.

SALE OF LEASED LAND—TENDER BY PURCHASER OF NEW LEASE—
REFUSAL OF TENANT TO ACCEPT.

Where a tenant is in possession of land under a written contract of lease, a subsequent purchaser of the land, with full knowledge thereof, cannot maintain an action for ejectment or unlawful detainer against the tenant, on the ground that a portion of the agreement had not been reduced to writing, and that the tenant refused to accept a new lease with such omitted portion incorporated.

Appeal from Superior Court, Mason County.

J. E. Sligh, for appellants.

Hartman & Tremper, for respondent.

The opinion of the court was delivered by

STILES, J.—This case represents one stage of a remarkable litigation. On the 5th of November, 1890, appellants bought a certain farm in Mason county, of one Walter. Before the conveyance was made they were fully acquainted by Walter with the fact that the premises were then in the possession of the respondent under an agreement made December 18, 1889, as follows:

“William Walter agrees to rent his place to A. Swanson for three years, and A. Swanson agrees to pay as rent, at the end of the first year or before, one hundred dollars, and at the end of the second year or before, two hundred dollars, and at the end of the third year or before, three hundred dollars. Possession will be given on or before February, 1890.” Signed, etc.

Appellants contend that both Swanson and Walter gave them to understand that only a portion of the foregoing

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agreement had been reduced to writing, but what the unwritten portion consisted of, or what terms were to be imposed upon either party, appellants are unable to show by any witness, although they argue with force and great length as to what it must have been. After their purchase of the premises, and before the first year of respondent's tenancy had expired, appellants endeavored to obtain from respondent some written declaration or agreement to the effect that in addition to money rent he would make certain specific improvements upon the land in the way of clearings, building fences, etc. In this they were unsuccessful, and the first year of the respondent's tenancy having ended February 1, 1891, they went to respondent upon the premises on the 9th day of that month, and offered to execute a lease to him of the unexpired two years in accordance with their understanding of the agreement between Walter and him, which included the making of a certain amount of improvements each year in addition to the money rent. Respondent refused this offer, and a few days later appellants commenced an action to obtain the possession of the premises.

This action, and two others of a like character, which were brought in April and June of the same year, were unsuccessful, each of them being terminated by the court sustaining a demurrer to the complaint.

September 2, 1891, this action was brought in the form of an ordinary action of ejectment, alleging the ownership of the property in the plaintiffs and the wrongful detention of the same from their possession by the defendant. A trial by jury was had and a verdict rendered for the defendant. The court granted a new trial and gave plaintiffs leave to amend their complaint. This amended complaint, probably for the first time in the history of the cases, stated the facts, not with the view, however, to fur-

ther litigation in an action of ejectment, but to a proceeding under the statute for unlawful detainer. This amended complaint, with a supplement thereto covering rent for the second year, and the amended prayer, which desired to take advantage of the act of the legislature concerning unlawful detainers passed in 1891, were strenuously objected to by respondent, who by his motion to strike endeavored to remove them from the record. The court, however, required him to go to trial upon his answer subsequently filed, after denying the motion to strike. The result of this trial was a non-suit entered by the court, but subsequently the court, on motion of the respondent himself, entered judgment for appellants and against respondent for the amount of the second year's rent, which was past due at the time of the trial.

It is not for us, upon a judgment consented to by the respondent, to set aside the court's action in rendering judgment against him for the rent, though it is difficult to see how he could consistently move for such a judgment against himself in an action which had been so unwarrantably changed in its character from one of ejectment to one of unlawful detainer. But there is no ground whatever for reversing the judgment in favor of the appellants. Their only contentions are—(1) That, admitting the agreement between Walter and Swanson to have been a contract for a lease, they fully complied with all that the law required of them in 1891, when they offered to execute a lease for the unexpired term of two years, which was refused by respondent; (2) that there was evidence that ought to have gone to the jury that, under the contract as made by Walter and Swanson, there were unwritten terms which they were justified in including in their proposed lease, and upon the refusal of which by Swanson they were justified in declaring the whole contract at an end and all right to

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a lease forfeited. This was a good contract for a lease to charge the purchaser, Swanson being in possession at the time of the sale by Walter, and the purchasers having full knowledge of the existence of his contract, and of his possession. The offer to execute a lease made in 1891 was not sufficient, because coupled with a proposition to include therein terms which were not expressed in the contract, those terms involving the payment of a larger rent than was specified by the written agreement. To avoid this proposition the appellants exhaust the limits of argument in a lengthy brief based solely upon theory and supposition. They say they were told by Walter and Swanson that the written agreement did not contain the entire contract, but they are totally unable to say what the unwritten portions consist of. They do not call Walter, and Swanson denies that anything was unwritten except the acknowledgment. They argue, however, that because it appears to be the fact that Swanson during the first year of his tenancy made various improvements upon the land, which he claims to have been worth five hundred dollars and upwards, and because witnesses are produced who testified that the fair rental value of the land was five hundred dollars a year, therefore, the improvements made by Swanson must have been intended as an additional rental; and, being so intended, they must have been contracted for; and having been contracted for for the first year, it must have been intended to contract for substantially the same rental each year; and therefore this was an unwritten part of the contract between the original landlord and tenant, and they were entitled to have it expressed in the lease which they offered to make. A train of reasoning such as this is hard to attack or even touch. The trouble with it is, it has no foundation. Admitting that the clearing proposition was something that had been agreed upon between the parties before their agreement was written out, it may just as well have been

that the entire contract was to be satisfied by improvements to the amount of five or six hundred dollars to be made during the term of three years, the time when it was to be made being entirely optional with the tenant. If he chose to make it all the first year, and have the advantage of it in the additional land which he could cultivate during the other years, he was entirely at liberty to do so. But neither Walter nor Swanson had a right to change the contract they made, the terms of which, when reduced to writing, were conclusive upon both unless proper equitable proceedings were taken by one or the other to correct it. If the appellants considered that good grounds existed why their proposed lease should contain some additional terms in accordance with the actual agreement made between Walter and Swanson, which were omitted by mistake, instead of bringing suit after suit to eject him, they should have commenced an action against him to reform the contract, and, in accordance with that, have tendered such a lease as would satisfy that contract when reformed. As it is, they have in the judgment for the second year's rent more than they were entitled to under the form of proceeding which they adopted in this case.

Judgment is affirmed with costs.

DUNBAR, C. J., and HOYT, ANDERS and SCOTT, JJ., concur.

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Syllabus.

[No. 643. Decided April 17, 1893.]

ANNIE SEARS AND FRANK SEARS, *Respondents*, v. SEATTLE
CONSOLIDATED STREET RAILWAY COMPANY, *Appellant*.

CARRIERS — INJURY TO PASSENGER — EVIDENCE — ARGUMENT OF
COUNSEL — NEGLIGENCE — INSTRUCTIONS — DAMAGES.

In an action for injuries received by a passenger as the result of a collision between an electric car and a wagon, where a witness has already testified that the car was running at the rate of about twelve miles an hour; that the wagon on the track was in plain view for a distance of four hundred feet; that the motorman commenced ringing the bell as a warning of his approach at about that distance from the wagon; that the man in the wagon made no attempt to get off the track until the car was pretty close to him, and that when the motorman found that the wagon was not going to get out of the way in time, he made every effort possible to stop the car, but that he was then within a hundred feet of the wagon, there is no error in permitting the witness, in answer to the question, "What was there, if anything, to prevent the motorman stopping the car and applying the brakes a long time before he did?" to testify that "He was running at too high speed to stop it in that distance."

The general rule of evidence that witnesses may not give opinions as to matters of fact does not preclude the evidence of common observers, who may state the results of their observations in regard to ordinary appearances and conditions of things which cannot be produced to a jury exactly as they were observed by the witness at the time.

Where the evidence, in an action for injuries as the result of negligence in the operation of an electric car, shows that the motorman in charge of the car at the time was discharged about three weeks later, but does not show the reason of his discharge, it is not improper argument for counsel for plaintiff to draw the inference from such fact and argue it to the jury, that the discharge of the motorman was on account of his carelessness at the time of the accident.

The fact that the testimony upon which the argument of counsel was based was incompetent cannot be raised for the first time in the supreme court, but the testimony should have been objected to when offered.

Where error is committed in permitting plaintiffs to ask a witness a question with a view to his impeachment, the error is harmless

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6	227
35	184

where the witness denies the imputed declarations and the testimony of the impeaching witness is subsequently stricken out by the court on motion of the defendant.

An instruction is not erroneous which charges a jury that a defendant is bound to exercise the highest degree of care, prudence and caution in the running and operating of its cars so as to prevent injury to its passengers, as such instruction means simply the highest degree of practicable care and prudence in conducting that particular business.

Where a motorman operating a car sees that the driver of a wagon in front of him on the track does not look back, nor pay any attention to the ringing of the bell, nor increase his rate of speed, nor attempt to leave the track, it is the duty of the motorman to bring his car under control, and, if necessary to avoid a collision, to stop his car; and the negligence of the driver on the wagon, in contributing to the injury received by a passenger on the car, affords no defense to the carrier.

A verdict for \$15,000 is not excessive in an action for injuries due to defendant's negligence, when the evidence shows that plaintiff, at the time of the accident, was a strong, healthy woman, of the age of thirty years; that she was industrious, and had been making fifty dollars per month, in addition to looking after household duties; that she has lost the use of her lower limbs by reason of paralysis, as a result of her injuries, and that she will be a helpless invalid during the remainder of her life.

(STILES and HOYT, JJ., dissent.)

Appeal from Superior Court, King County.

Wiley, Scott & Bostwick, for appellant.

Thompson, Edsen & Humphries, for respondents.

The opinion of the court was delivered by

ANDERS, J.—The appellant owns and operates lines of street railways in the city of Seattle, one of which has its terminus at Fremont, a suburban village some distance from the main portion of the city, and situated at the north end of Lake Union. It is known as the Fremont line, and connects with another line of street railway which extends to Green Lake, in the northern portion of the city. On September 16, 1891, the respondent Annie Sears entered

upon one of the cars of the appellant to go to Green Lake. The motive power used upon the said railway is electricity, and the car upon which the respondent became a passenger at the time above mentioned was what is called an "open car." Before reaching Fremont, and while the car upon which Mrs. Sears was riding was going down a grade on Roland street, it collided with a wagon which was upon appellant's track and going in the same direction, ran off the track, and turned to the left, and ran across the street to the verge of an embankment, which was sixteen feet from the left, or west, rail of the railway track. The respondent was seated on the right hand side of the car, and when she saw that the car was leaving the track she became frightened and rose up from her seat and took hold of the post supporting the roof of the car with her right hand to steady herself, and endeavored to jump from the car. In so doing she struck upon her feet, but was thrown down upon her back close to the left hand side of the track, and thereby received a serious injury. Nearly all of the other passengers leaped from the car at about the same time, but neither they nor the one or two persons who remained in the car were in any wise injured. The respondents, who are husband and wife, instituted this action to recover damages for the injury so received by said Annie Sears, and alleged in their complaint that said injury was caused by the negligence of the servants and employes of appellant in the management of its car. The defendant, in its answer, denied that the alleged injury was caused by any negligence or carelessness on its part, and affirmatively alleged that if the said Annie Sears sustained the injury mentioned in the complaint, it was caused wholly by her own carelessness and negligence. There was a verdict and judgment for plaintiffs, and the defendant brings the case here for review.

The first error assigned by the appellant is, that the trial

court, over the objection of appellant, wrongfully permitted a witness for plaintiffs, Mr. Eck, to answer the question, "What was there, if anything, to prevent him (the motorman) stopping the car and applying the brakes a long time before he did?" The witness answered, "He was running at too high speed to stop it in that distance."

The learned counsel for the appellant insists that this was, in effect, permitting the witness to give his opinion to the jury upon the question, whether or not the defendant was negligent in the management of its car. The witness had already testified that the car was running at the rate of about twelve miles an hour; that the wagon on the track was in plain view for a distance of four hundred feet; that the motorman commenced ringing the bell as a warning of his approach at about that distance from the wagon, and rang it continuously thereafter; that the man in the wagon made no attempt to get off the track until the car was pretty close to him, and that when the motorman found that the wagon was not going to get out of the way in time, he made every effort possible to stop the car, but that he was then within a hundred feet or more of the wagon. Under these circumstances, we think it was not error to overrule the objection to the question, even upon the theory of the appellant, that the testimony given in response thereto was the expression of the opinion of the witness, and not the statement of a fact within his own knowledge.

It is a general rule of evidence that witnesses may not give opinions as to matters of fact which the court or jury are ultimately to determine. But this rule is not without exception. And the exception is not confined to the evidence of experts who may give opinions on questions requiring special skill, knowledge or learning, but includes the evidence of common observers who may state the results of their observations in regard to ordinary appear-

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ances and conditions of things which cannot be produced to a jury exactly as they were observed by the witness at the time. Non-expert witnesses who have had opportunities to observe, and who have actually observed the demeanor, actions and appearance of a particular individual are competent to express an opinion upon the question whether such person was sane or insane. And every person of ordinary understanding and intelligence is competent to give an opinion as to the identity of persons or things; as to whether another appeared to be sick or suffering from pain; and as to the direction from which a blow was delivered which produced a wound upon the person of another. *People v. Hopt*, 4 Utah, 247 (9 Pac. Rep. 407.)

Of course the weight of such testimony depends upon the thoroughness of the observation of the witness; and whether he has sufficiently observed and considered the particular fact or matter under consideration to enable him to form an opinion in respect thereto, is a question which, if raised, is to be determined by the court, by the application of the same rule which governs in ascertaining the qualifications of experts. In *People v. Hopt*, *supra*, this question is very elaborately and satisfactorily discussed, and many cases cited showing particular instances in which non-experts have been allowed to express opinions. And the supreme court of Utah, in delivering the opinion in that case said:

“The admissibility of the evidence rests upon three necessary conditions—(1) That the witness detail to the jury, so far as he is able, the facts and circumstances upon which his opinion is based, in order that the jury may have some basis by which to judge of the value of the opinion; (2) that the subject matter to which the testimony relates cannot be reproduced and described to the jury precisely as it appeared to the witness at the time; and (3) that the facts upon which the witness is called upon to express

his opinion are such as men in general are capable of comprehending and understanding.”

We think the rule there laid down is clearly deducible from the authorities, and that, tested by it, there was no error in the ruling of the court upon the point in question. The witness in this case expressed his opinion as a conclusion of fact based upon the observation made by him, at the time of the accident, as to the rate of speed of the car and the exertions made by the motorman to stop it; and it seems to us that the testimony is clearly embraced within the rule above stated.

On the trial of this cause it was shown, upon the cross-examination of the motorman in charge of the car at the time in question, that he was discharged by the railway company about three weeks after the casualty occurred, but no testimony was adduced showing why he was so discharged. Counsel for the respondents, in alluding to the fact in his address to the jury, remarked, among other things:

“Mr. Silverthorn states that he did his whole duty; but that, notwithstanding that, the company discharged him. Gentlemen, he did not do his duty, and the company discharged him on account of his carelessness and incompetency at the time of the accident.”

Counsel for the appellant objected to the remarks so made, on the ground that there was no evidence that the man was discharged on account of this accident. The counsel for the respondent then admitted that there was no such testimony, but insisted that his argument was proper upon the evidence before the jury. The judge also stated that there was no evidence that the motorman was discharged on account of the accident, but further remarked that:

“The court will allow the utmost freedom in the argument of the case, and counsel have a right to argue what

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he may deem the testimony may prove, and draw such inferences from it as he may see fit. It is for the jury to determine what the facts are. The court cannot indicate what the argument shall be. The court bears the counsel out in saying there was no testimony that he was discharged in consequence of it, but that he was discharged two or three weeks afterwards; but why he was discharged I believe is a proper matter for comment to the jury."

The learned counsel for the appellant excepted to the ruling of the court, and now contends that the same was erroneous and prejudicial to appellant. But we think the appellant is not entitled to a judgment of reversal on that ground. It is the duty of the court, in all cases, to restrict the argument of counsel to the facts in evidence, and not to permit the opposite party to be prejudiced by any statement of facts not a part of the evidence. But counsel must be allowed some latitude in the discussion of their causes before the jury, and if they are not permitted to draw inferences or conclusions from the particular facts in evidence it would be impossible for them to make an argument at all. The mere recital of facts already before the jury is not an argument. There must be some reason offered for the purpose of convincing the mind, some inference drawn from facts established or claimed to exist, in order to constitute an argument. But counsel cannot be compelled by the court to reason logically or to draw correct inferences from given facts; and if they err in these respects it is no ground for a new trial. *Proctor v. De Camp*, 83 Ind. 559. See, also, *Hinton v. Cream City R. R. Co.*, 65 Wis. 323 (27 N. W. Rep. 147); *Scott v. Chicago, etc., Ry. Co.*, 68 Iowa, 362 (24 N. W. Rep. 584); *Dowdell v. Wilcox*, 64 Iowa, 721 (21 N. W. Rep. 147); *Columbia, etc., R. R. Co. v. Hawthorne*, 3 Wash. T. 353 (19 Pac. Rep. 25); *Skagit Railway & Lumber Co. v. Cole*, 2 Wash. 74 (25 Pac. Rep. 1077).

In this case, although counsel may have drawn an unwar-

ranted conclusion from the fact that the manager of the car was discharged some time after the accident, still we think he had a right to comment on the evidence, and to draw such inferences from it as he deemed fit and proper, and the court properly refused to undertake to prevent him from so doing.

It is claimed, however, by the appellant, that the testimony upon which the remarks of the respondents' counsel were based—that the motorman was discharged—was incompetent, and therefore prejudicial to the appellant. However that may be, it is not shown by the record that the testimony was objected to when offered, and the objection cannot be here made for the first time. It seems altogether probable that if this testimony had been objected to in the trial court, it would have been excluded, for the jury were specially instructed that the fact that the motorman was discharged raised no presumption of negligence on the part of the railway company. And this instruction, which we cannot presume was disregarded by the jury, plainly indicated to them that the inference drawn from the testimony by counsel for the respondents, and which he sought to impress upon their minds in his closing argument, was not warranted and should not be entertained by them.

Upon the cross examination of the witness Silverthorn, the motorman in charge of the car, counsel for the respondents, with a view to impeach him, asked him if he did not make certain statements to one Eck in a conversation with the latter at Fremont, soon after the accident. The testimony was objected to by counsel for the appellant, and the objection overruled by the court. But, as the witness denied making any of the declarations imputed to him, and as all of the testimony of Eck in reference to the conversation was stricken out by the court, on motion of counsel for the appellant, we fail to see wherein the appellant was prejudiced by the action of the court in that regard.

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The next alleged error relates to the instructions given to the jury. It is contended that the court erred in charging the jury that the defendant was bound to the exercise of the highest degree of care, prudence and caution in the running and operating of its cars, so as to prevent injury to its passengers. And it is claimed by the appellant that this instruction, in effect, informed the jury that the appellant was an insurer of the lives and limbs of its passengers, and would be responsible for an injury to one of its passengers, even though it had used all the care and prudence which it was possible to use under the circumstances. But we do not think that the instruction, especially when applied to the facts and circumstances of the case, is fairly susceptible of the construction placed upon it by counsel for the appellant. If the appellant used all the care and prudence which it was possible to use under the circumstances, then, in the language of the court, it used the highest degree of care, prudence and caution. The highest degree of care, prudence and caution *in running and operating street cars* so as to prevent injury to passengers, cannot be said to mean such a degree of care as will absolutely prevent injury, or such care as is inconsistent with that mode of conveyance, but means simply the highest degree of practicable care and prudence in conducting that particular business. Instructions similar to the above have frequently been approved by the courts. See *Topeka City Ry. Co. v. Higgs*, 38 Kan. 375 (16 Pac. Rep. 667); *Sales v. Western Stage Co.*, 4 Iowa, 547; *Fairchild v. California Stage Co.*, 13 Cal. 599; *Stokes v. Saltonstall*, 13 Pet. 181; *Dougherty v. Missouri Railroad Co.*, 97 Mo. 647 (8 S.W. Rep. 900); *Coddington v. Brooklyn, etc., R. R. Co.*, 102 N. Y. 66 (5 N. E. Rep. 797); *Furnish v. Mo. Pac. Ry. Co.*, 102 Mo. 438 (13 S. W. Rep. 1044).

But the court also instructed the jury, at the request of appellant, as follows:

“You are instructed, while the defendant, as a common carrier of passengers, is held to the highest degree of care and prudence which is consistent with the practical operation of its cars and transaction of its business, still it is not an insurer of the lives and limbs of its passengers.”

The appellant, of course, makes no complaint against this latter instruction, but insists that the two are inconsistent with each other, and hence misleading and erroneous. But we cannot agree with counsel's contention. The latter modifies, or rather explains, the meaning of the former, but we cannot see that it in any wise contradicts it.

In our opinion the court properly refused to give to the jury instructions Nos. 6 and 7, requested by the appellant. They were predicated upon the idea that because the man in charge of the wagon failed to drive off the track, as he should have done, and as the motorman expected, in time to avoid a collision, and was thus in some measure to blame for the accident, the appellant should not be held responsible. No doubt the instructions requested would have been proper in an action against the appellant by the driver of the wagon for damages to him caused by the collision. But in this case, the respondents had no control over the driver of the wagon, and no contractual relation whatever existed between them and him, and they were in no way responsible for his actions.

“It is no defense for a negligent carrier, as against his passenger, that the negligence or trespass of a third party contributed to the injury, although the latter acted independently of the carrier.” 2 Shear. & R., Neg. (4th ed.), § 502; *Eaton v. Boston, etc., R. R. Co.*, 11 Allen, 500; *Carpenter v. Boston, etc., R. R. Co.*, 97 N. Y. 494; *Little v. Hackett*, 116 U. S. 366 (6 Sup. Ct. Rep. 391).

The questions for the jury to determine were, was the appellant guilty of negligence in the management of its car, and, if so, was the injury sustained by the respondent Mrs. Sears solely the result of such negligence? The jury

answered these questions in the affirmative, and a careful examination of the evidence convinces us that they arrived at a correct conclusion. No reason is given for not stopping the car before it came in contact with the wagon, except that the man in charge thought that the wagon would be removed from the track before he reached it. And yet this same man testified that the man in charge of the wagon made no attempt to leave the track until the car was so near him that a collision could not be avoided by putting on the brakes or reversing the motion of the wheels of the car. It seems plain to us that when the motorman saw that the person on the wagon neither looked back nor paid any attention to the ringing of the bell, nor increased his rate of speed, nor attempted to leave the track, it was his duty to bring his car under control, and even to stop, if necessary, to avoid a collision. 2 Shear. & R., Neg., § 483. By the exercise of reasonable care and diligence on the part of appellant's employé, the injury might have been avoided, and by failing to exercise such care and diligence he failed to discharge his duty to the respondent Mrs. Sears as a passenger. The wagon was seen by him at a distance of at least four hundred feet, and no valid reason is shown why the car could not have been stopped within half that distance, and the motorman himself says he would have stopped if he had known the wagon was going to remain on the track.

The jury in this case assessed the damages at \$15,000, which sum appellant claims is excessive. The amount of damages, in cases like this, to which a party is entitled is a matter to be determined by the jury from all the facts and circumstances, and their verdict should not be disturbed on the ground of excessiveness unless the amount is so large as to indicate passion or prejudice.

The sum awarded by the jury is certainly a large one, but we are unable to discover that it was the result of

passion or prejudice, or that it is even greatly in excess of a fair compensation for the injury received. The testimony shows that Mrs. Sears, at the time of the accident, was a strong, healthy woman, of the age of thirty years; that she was industrious, and, in addition to looking after her own household duties, had been making fifty dollars per month. The testimony further shows that her injury is permanent; that she has lost the use of her lower limbs by reason of paralysis resulting from a concussion of the spinal cord, and that she will be a helpless invalid during the remainder of her life. These facts were all before the jury, and they have, so far as we can see, exercised their best judgment as to the amount of compensation she ought to receive; and we perceive no legal grounds for disturbing the verdict. *Gulf, etc., Ry. Co. v. Dorsey*, 66 Tex. 148 (18 S. W. Rep. 444); *Robinson v. Marino*, 3 Wash. 434 (28 Pac. Rep. 752); *Phelps v. Steamship City of Panama*, 1 Wash. T. 518; *Columbia, etc., R. R. Co., v. Hawthorne*, 3 Wash. T. 353 (19 Pac. Rep. 25).

The judgment of the court below is affirmed.

DUNBAR, C. J., and SCOTT, J., concur.

STILES, J. (*dissenting*).—I desire simply to call attention to the instructions requested by the defendant, numbers six and seven.

The court in this case gave a series of instructions, requested by the plaintiff, which, from beginning to end, were argumentative, and wholly devoted to the suggestion of facts necessary to be found to justify the jury in finding for the plaintiffs, and failed to state any ground which would be sufficient to excuse the defendant from the charge of negligence. In general terms the jury were told that the acts of the defendant must have been negligent in order to entitle the plaintiffs to recover, but nowhere was there any definition of negligence. Thus the jury were left

wholly to the exercise of their judgment as to the law of negligence, and were told in plain terms that if certain facts claimed by the plaintiffs to have been proven were found by them, they should find for the plaintiffs.

Over against this, the defendant, in order to have its case presented upon an equal footing before the jury, asked the following instructions:

“6. If the jury believe from the evidence that the motorman was properly operating his car, and sounded his gong in sufficient time to lead a reasonably prudent person to believe that the driver of the wagon would leave the track, and that this gong or bell was in good order, and of the kind usually in use on street cars to give warning to persons on the track; and the motorman believed that the driver of the wagon heard the gong and believed, or had good reason to believe, that the driver of the wagon would leave the track; and that as soon as the motorman ascertained that the driver of the wagon would not leave the track, he applied the brakes and did all that could be done to stop the car, then the defendant is not guilty of negligence.

“7. The operators of street cars have a right to presume that persons driving on the track will use ordinary care and precaution to prevent accidents by driving off the track in order to let cars pass them, especially when the ordinary warning signals are given; and in this case, if you believe from the evidence that such signals were given in sufficient time to lead an ordinarily prudent person to believe that such warning was heard by the driver of the wagon, and that the driver, if he had heard the warning, had sufficient time to leave the track in order to prevent a collision, then the defendant is not guilty of negligence, and your verdict should be for the defendant.”

In my judgment these two charges should have been given. The plan of substantially narrating all the facts in the case to the jury, and telling them if they find those facts to be true they should find one way or the other, may, or may not, be a proper method of charging the jury upon the law. But the court in this case having adopted that

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plan in giving the plaintiff's side of the case should have followed it up by putting the defendant's side in the same position before the jury.

The substance of the requests, as above quoted, was that the operator of a street car has a right to presume that the driver of a wagon will, upon being sufficiently warned, leave the track clear for the car to pass; a right, the existence of which cannot be doubted, unless street car operators are to be held as insurers of their passengers against any possibility of accident by collision, a position which the court has taken particular pains to show was not taken by the court below, as it could not be. Taking the charge as given as a whole, it amounted to nothing but a presentation of the plaintiffs' case, and all the facts thereof in detail, with a few disconnected general statements of law requested by the defendant, and was in no sense a fair or impartial charge to a jury. For these reasons the judgment should have been reversed.

HOYT, J., concurs.

[No. 829. Decided April 20, 1893.]

W. H. SURBER AND FRANK EAGAN, *Appellants*, v. C. H. KITTINGER *et al.*, *Respondents*.

SUIT IN EQUITY CHANGED TO ACTION AT LAW.

Although an action may be commenced as an equitable one, yet, where there is nothing to give a court of equity jurisdiction thereof, the court has authority to permit it to be tried as an action at law, if the defendant is not thereby prevented from having a fair trial.

Appeal from Superior Court, Whatcom County.

Fairchild & Rawson, for appellants.

Beriah Brown, jr., for respondent Burns.

6 240
124 623
6 240
26 296

The opinion of the court was delivered by

SCOTT, J.—This action was brought to foreclose a mechanic's lien to recover the sum of \$2,855. The claim arose upon a contract for driving piles upon tide lands, and a lien was sought to be enforced against a wharf erected thereon. The complaint prayed for a personal judgment against the defendants, and also that the amount be decreed a lien upon the structure in question. Judgment by default was entered against certain of the defendants for the amount claimed. Frank Burns, the respondent, appeared and filed an answer. When the case was called for trial the plaintiffs announced to the court that they waived any claim to a lien for the reason that there was no foundation therefor, the title to the land being in the state, and the structure consequently not being subject to a mechanic's lien, and they demanded that the cause be tried by a jury as an action at law. The defendant objected to this on the ground that the pleadings showed that the cause was an equitable one. The court overruled the objection, and a jury was called and trial had which resulted in a verdict for the plaintiffs. The defendant filed a motion to quash this verdict and dismiss the action upon the grounds that the suit was instituted in equity for the purpose of foreclosing the lien, and, as there was no foundation for a lien, the court had no jurisdiction to proceed with the cause, and it should have been dismissed, thus attempting to renew the question previously disposed of. The court granted this motion, set aside the verdict and dismissed the action, and plaintiffs appealed.

The ruling of the court in quashing the verdict and dismissing the cause was erroneous. Although the action was originally commenced in equity the court had authority to permit it to be tried as an action at law, there being nothing to give a court of equity jurisdiction thereof. The court

did this, and a trial was had, which, to all appearances, was a fair one, as there was no claim made by the defendant that he was surprised in any way or prevented from having a fair trial by reason of the action of the court in the premises.

Judgment reversed, and cause remanded with a direction to enter judgment upon the verdict in favor of the plaintiffs.

DUNBAR, C. J., and HOYT, ANDERS and STILES, JJ., concur.

[No. 797. Decided April 21, 1893.]

SILAS W. BURT, *Respondent*, v. RICHARD AGASSIZ *et al.*,
Respondents, AND FRANK A. STEWART, *Appellant*.

FRAUDULENT CONVEYANCES—SUFFICIENCY OF EVIDENCE.

A judgment holding certain conveyances fraudulent on the ground that they were executed to hinder, delay and defraud creditors will not be disturbed where the evidence shows that, at the time of the transfers, the grantors were indebted to their grantee in the sum of \$1,750, which was amply secured by collateral notes, and otherwise; that one of the grantors and the grantee were partners in business; that at the time of the transfers a suit was being prosecuted against the grantors to recover the sum of \$20,000, although this suit was subsequently decided in favor of the defendants; that the total indebtedness of the grantors to the grantee, including loans and advancements subsequent to the conveyances, which, it was claimed, were intended merely as mortgages, never exceeded the sum of \$8,000, while the value of the property transferred was greatly in excess thereof; and that after the conveyances the grantors still continued to collect rent from various tenants.

Appeal from Superior Court, King County.

Hughes, Hastings & Stedman, for appellant.

Bausman, Kelleher & Emory, for respondent Burt.

The opinion of the court was delivered by

SCOTT, J.—We are of the opinion that the decision of the court holding the conveyances from the Pantings to appellant fraudulent on the ground that they were executed to hinder, delay and defraud creditors must be sustained. At least we do not find the evidence strong enough the other way to justify us in overturning the same, under its most favorable view for the appellant.

In cases like this, where the decision turns solely upon a question of fact, it is generally not advisable to burden the reports with a detail of the evidence. A few of the more salient points, however, will be stated. At the time of the transfers from the Pantings to Stewart it appears that James Panting was indebted to Stewart in the sum of \$1,750 only; that the whole of this amount was then amply secured by collateral notes and otherwise; that Stewart had not requested any further security; that at said times a suit was being prosecuted against the Pantings to recover the sum of twenty thousand dollars; that James Panting and Stewart were partners in business.

It is claimed that the deeds to the real estate in question were not intended as absolute conveyances, but were given for the purpose of securing the indebtedness then existing from Panting to Stewart, and for future loans and advancements. The whole of said indebtedness, including all advances made, at no time exceeded the sum of eight thousand dollars, according to appellant's claim, while the value of the property transferred was greatly in excess of this. After said conveyances Panting continued to collect rent from various parties occupying said premises. It is claimed that this was done as the agent of Stewart. It is conceded that the suit aforesaid was subsequently decided in favor of the defendants, but it was pending at the time said conveyances were made.

It is further contended that the conveyance to Agassiz should be sustained in any event, but the appellant is in no position to question the ruling of the court upon the conveyance made by him to Agassiz, and Agassiz himself did not appeal therefrom.

Judgment affirmed.

HOYT, ANDERS and STILES, JJ., concur.

DUNBAR, C. J., not sitting.

6	244
10	586
33*	428
39*	154
6	244
15	361
6	244
20	229
6	244
27	400

[No. 493. Decided April 24, 1893.]

WILLIAM WALKER, CYRUS WALKER AND D. B. JACKSON,
Respondents, v. S. BAXTER, *Appellant*.

ESTOPPEL—PLEADING.

In an action by certain parties for the price of oats sold defendant, an answer by defendant that the plaintiffs sold him the oats not as individuals but in their corporate capacity as officers and stockholders of a mill company, and that he purchased the oats for more than the market price for the reason that said mill company was indebted to him, is not sufficient as a plea of estoppel, as it does not aver that defendant was induced to believe that the mill company was the owner of the oats by any statement, representation or act on the part of plaintiffs.

The facts constituting an estoppel must be specially pleaded in order to be available as a defense.

Appeal from Superior Court, King County.

J. B. Metcalfe, for appellant.

Hughes, Hastings & Stedman, for respondents.

The opinion of the court was delivered by

ANDERS, J.—This action was brought by the respondents to recover the purchase price of oats alleged to have

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been sold and delivered by them to the appellant. The defendant denied that the plaintiffs were the owners of the oats, or that they sold or delivered the oats to the defendant, and for a separate and affirmative defense, by way of estoppel, alleged:

“At all the times herein mentioned the Puget Mill Company was an existing corporation, doing business as such corporation by virtue of the laws of the Territory of Washington, now continuing in force as laws of the State of Washington. And at all the times herein mentioned the plaintiffs, and each of them, were and they now are stockholders, officers and agents of the said corporation, and, as such agents, had and now have the charge, management and control of the business of said corporation. And on the 16th day of October, 1889, the said corporation, the Puget Mill Company, by and through its agent, William Walker, one of the plaintiffs herein, sold and delivered the oats referred to in said complaint to this defendant. And at the time of sale and delivery of said oats, the said corporation, the Puget Mill Company, was justly indebted to this defendant in the sum of \$2,078.00, which indebtedness has never been paid, and, upon receiving the oats referred to in plaintiffs' complaint from said corporation, this defendant credited to said corporation upon account the amount of the purchase price of said oats, to wit: The sum of twenty-one hundred and fifty-four and $\frac{8}{100}$ dollars (\$2,154.08). And the price which defendant agreed to pay for said oats in making purchase thereof was and is higher than the market at the time justified defendant in paying, and was and is higher than this defendant would have paid for said oats if he had not purchased the same from said mill company, which was then indebted to him as aforesaid.”

To this affirmative defense the plaintiffs interposed a demurrer (which seems to have been treated as a motion to strike out), which was sustained by the court, and the cause proceeded to trial upon the issues raised by the denials in the answer, the result of which was a verdict and judgment for the plaintiffs.

The appellant insists that the court erred in sustaining the demurrer, for the reason that the facts stated in the affirmative defense were sufficient to constitute an estoppel *in pais*, and, if proved, would have been a complete defense to the action. But, in our judgment, the ruling of the court was indisputably correct and proper. The insufficiency of the pleading as an estoppel is patent upon its face. It nowhere avers that the appellant was induced to believe that the Puget Mill Company was the owner of the oats, by any statement, representation or act, made or done, by the respondents. Nor does the pleading contain any other allegation constituting an element of estoppel. See Bigelow on Estoppel (5th ed.), 556, 570. It is at most a mere argumentative denial of the allegations of the complaint, or, in other words, a statement of facts showing that those allegations are untrue.

At the trial, the appellant sought to introduce testimony, under his denials, tending to show an estoppel *in pais*, and he now claims that the court erred in excluding such testimony. We think the testimony was properly excluded. Under our system of pleading the facts constituting an estoppel must be specially pleaded in order to be available as a defense. Code Proc., § 194. And such is the rule generally in those states which have adopted the reformed procedure. See Bliss, Code Pleading, § 364; Boone, Code Pleading, § 67; *Warder v. Baldwin*, 51 Wis. 450 (8 N. W. Rep. 257); *Anderson v. Hubble*, 93 Ind. 570; *Phillips v. Van Schaick*, 37 Iowa, 229.

The instructions to the jury requested by the appellant were not warranted by the evidence, and were, therefore, properly refused; and those given, we think, fairly presented the law applicable to the case.

We perceive no error in the record, and the judgment of the court below is, therefore, affirmed.

DUNBAR, C. J., and HOYT, SCOTT and STILES, JJ., concur.

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[No. 621. Decided April 24, 1893.]

SARIA M. LEDDY, *Respondent*, v. JOHN ENOS, *Appellant*.CONVEYANCES—WARRANTY—COVENANT FOR QUIET ENJOYMENT—
PAYMENT BY GRANTEE OF DELINQUENT TAXES.

Where a grantor, instead of simply using the word "warrant" in a conveyance and leaving the statute to define what should be implied thereby, goes farther and sets out the particular thing or things which he will warrant against, he cannot be held to have intended other covenants than the one or ones thus set out. (DUNBAR, C. J., dissents.)

The payment by the grantees of taxes which were a lien upon the land at the time of the conveyance, is not a breach of a covenant for quiet enjoyment, when there is nothing to show that anything is being done by the city or county that will in any manner endanger the title of the grantee. (DUNBAR, C. J., dissents.)

Appeal from Superior Court, King County.

M. Gilliam, for appellant.

Frank G. Haddock (*James Leddy*, of counsel), for respondent.

The opinion of the court was delivered by

ANDERS, J.—It is only necessary for us to decide one of the questions presented by the record in this case, and that is as to the sufficiency of the complaint. The case was brought to recover damages for a breach of the covenants of a deed made by appellant to the respondent. There was no special covenant against incumbrances in said deed. The only covenant relied upon and set out in the complaint was substantially as follows:

“And the said party of the first part, his heirs, executors and administrators, does by these presents covenant, grant and agree to and with the said party of the second part, her heirs and assigns, that he, the said party of the first part, his heirs, executors and administrators, all and singu-

lar the premises hereinbefore conveyed, described and granted or mentioned, with the appurtenances, unto said party of the second part, her heirs and assigns, and against all and every person and persons whomsoever lawfully claiming or to claim the same, or any part thereof, shall and will warrant and forever defend."

The alleged breach of covenant was the fact that certain taxes assessed by the city of Seattle and the county of King upon the land conveyed were due and unpaid, and the damages sought to be recovered were on account of the payment of such taxes. It is contended on the part of the appellant that the covenant above set out was simply one for quiet enjoyment and not one against incumbrances, and that since the only breach assigned was the existence of an incumbrance on the property the complaint upon its face showed no violation of the covenants of the deed. That the covenant is not one against incumbrances is conceded by respondent, if the language is to be construed without any aid from our statute. She contends, however, that as such statute provides that a deed which is made in the form prescribed therein, shall be construed as a warranty deed carrying implied covenants as provided for in said statute, one of which is against incumbrances, this deed must be construed as though such covenant had been expressed therein.

We are unable to agree with this contention. It is evident that this deed was not drawn in view of such statute, and not being so drawn the implied covenants provided for therein would not obtain. By virtue of the statute certain covenants were implied from the use of the word warrant in a deed. But these covenants were to be implied only when there were none expressed. But where, as in this case, the grantor, instead of simply using the word "warrant" and leaving the statute to define what should be implied thereby, goes farther and sets out the particular thing or

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things which he will warrant against, he cannot be held to have intended other covenants than the ones thus set out.

It follows that the covenants of the deed in question were only those for quiet enjoyment. Such being the case, was there a breach thereof by reason of the unpaid taxes upon the land? The respondent concedes that under the doctrine formerly existing such incumbrance would not constitute a breach of such covenants. She contends, however, that under the modern rule the grantee may pay off incumbrances, and under the covenants for quiet enjoyment recover the same from the grantor. Whether or not this is true as to any incumbrance before the same has been actively asserted against the grantee in such a manner as to endanger his title, in our opinion no such right exists until there has been at least some threat that it would be so asserted. The complaint in this case does not show that there was anything being done by the city or county that could in any manner endanger the title of the plaintiff. For all that appears in the complaint the appellant may have intended to contest such taxes in the courts, and have them set aside, or failing that, to pay them. Under these circumstances, the payment thereof by respondent was a purely voluntary one, and no liability was thereupon incurred by the grantor in the deed on account of the covenants contained therein.

The judgment must be reversed, and the cause remanded with instructions to dismiss the action.

HOYT, SCOTT and STILES, JJ., concur.

DUNBAR, C. J. (*dissenting*).—I am unable to agree with the reasoning or conclusions of the majority. I think the contention of the respondent, that the deed, which is made in the form prescribed by statute, should be construed as a warranty deed carrying implied covenants as provided for in said statute, is irresistible, and that the deed must be

construed as though such covenants had been expressed therein.

Nor do I think with the majority that the deed is taken out of the statute because it is made fuller than the statutory form requires. The excess is simply surplusage, and does not bring it within the rule of *expressio unius est exclusio alterius*. Nor do I think that it was the duty of the grantee to stand idly by and see the incumbrances on his land increased by penalties accumulating as delinquent taxes. He rightly made his damages as light as possible by the payment of taxes, and ought not to be made to suffer for doing that which the law in every other character of case would compel him to do. Certainly no presumption will attach that the taxes were illegally levied, and will be successfully contested. The presumption is exactly the reverse. The judgment should be affirmed.

[No. 918. Decided April 25, 1893.]

THE STATE OF WASHINGTON, *on the relation of the City of Seattle, Appellant*, v. JAMES M. CARSON, *Respondent*.

MUNICIPAL CORPORATIONS—CITIES OF FIRST CLASS—COLLECTION OF TAXES BY COUNTY TREASURER—CONSTITUTIONAL LAW.

The act of March 9, 1893, entitled "An act to provide for the assessment and collection of taxes of cities of the first class, and specifying the duties of certain county officers in regard thereto," does not violate any constitutional provision relating to municipal corporations, as it leaves the power to impose taxes unaffected, but works an amendment to all conflicting provisions of charters of cities of the first class upon the subject of the assessment and collection of taxes.

A legislative act which provides that the county treasurer shall be charged with the duty of assessing and collecting city taxes, and that the city shall pay him therefor the sum of \$500 per year, does

6	250
6	369
6	373
33*	498
33*	503
33*	504
6	250
9	282
33*	428
37*	439
6	250
19	655
19	656
6	250
121	101

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not violate the constitutional inhibition against increasing the compensation of any public officer during his term of office.

The act of March 15, 1898, repealing "all acts and parts of acts heretofore enacted by the legislature of the Territory or State of Washington providing for the assessment and collection of taxes in this state," affects laws relating to state taxation generally, and has no application to the special provisions of the law of March 9, 1893, relating to the collection of taxes in cities of the first class.

Appeal from Superior Court, King County.

Battle & Shipley, for appellant.

George Donworth, and *James B. Howe*, for respondent.

The opinion of the court was delivered by

SCOTT, J.—This is a cause just heard upon a special assignment, and the necessity for an immediate decision prevents an elaborate discussion of the questions involved, and a full review of the authorities. It is contended by appellant that an act of the recent legislative assembly, approved March 9, 1893, entitled "An act to provide for the assessment and collection of taxes of cities of the first class, and specifying the duties of certain county officers in regard thereto, and declaring an emergency," (Laws 1893, p. 167) is without effect for the several reasons hereinafter mentioned.

First, That it is void as being in contravention of the inherent right of a municipal corporation to regulate its affairs which are purely local, and that it conflicts with § 10, art. 11, of the constitution of the state, which provides that:

"Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a major-

ity of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized and all charters thereof framed or adopted by authority of this constitution shall be subject to and controlled by general laws. Any city containing a population of twenty thousand inhabitants or more shall be permitted to frame a charter for its own government consistent with and subject to the constitution and laws of this state," etc.

Appellant contends that cities of the first class organized under freeholders' charters are not within the clause which provides that cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws. Appellant contends that such cities have the right of local self-government, and that the legislature cannot interfere therewith; that they are subject to the constitution and general laws of the state, but that the words "controlled by" were not intended to apply to such cities; that the words "subject to" and "controlled by" are not synonymous, either in their ordinary meaning or as therein intended; that it is significant that in the third paragraph, where specific provision is made for cities of over twenty thousand inhabitants, the word "controlled" is dropped, and charters of such cities are only required to be "consistent" with, and "subject" to, the constitution and laws of the state; that strictly speaking, the words "subject to" do not involve the idea of power to "direct" or "govern." And as further sustaining the contention that cities forming their own charters are not to be "controlled" by the legislature in the regulation and management of the affairs of the municipality, and its rights to prescribe the name and number of its officers and *require* them to perform certain duties, we have but to take into consideration the fact that the legislature must control all cities not having a population of twenty thousand inhabit-

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ants or more, for the reason that such cities have no power to adopt their own charters, while the latter mentioned cities have such power, and such charter, when adopted, is for its own "government" and the "organic law thereof," which facts could not exist consistent with the right of the legislature to enact laws for the "government" thereof, which shall be the "organic law thereof;" and such would be the logical and legal result, if the legislature has the power to pass a law of the nature of the one in question, which both logically and legally does "direct" and "govern" the matter of the assessment and collection of the city taxes of the city of Seattle, depriving the city comptroller of the power to assess city property for city taxes, and the city treasurer of the power to collect such taxes; that assuming that cities of twenty thousand or more inhabitants are "subject to," but are not to be "controlled" by, the legislature, what is the correct meaning of the words "subject to?" that there are certain well defined powers and duties belonging to, and exercised by, municipal corporations, some of which rights, powers and duties concern solely the municipality, while in some others the state has a joint interest; that the sole and exclusive exercise by the municipality of the former, must exist without let or hindrance, else the constitution makers and legislators must be considered as performing vain and useless tasks in providing for the formation of municipal corporations. There are other rights, powers and duties, however, which such municipalities do not ordinarily possess, and which the due and orderly administration of the affairs of government require they should not have, or if they do have and possess, are of such a nature that in the exercise thereof the people of the state at large are also interested, and so far as regards these matters they are "subject to," and should be "subject to," the constitution and laws of the state. The very term, however, "subject to," implies a *separation*

from the state at large for certain purposes, and also unnecessarily implies an *independent* separation for the exercise of some rights and powers, otherwise a provision of the constitution making them "subject to" would be a wholly useless and unnecessary provision. That, for instance, § 2, of article 7 of the constitution, provides that "the legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money," etc. The legislature passes such a law. The city of Seattle would be "subject to" the provisions of this law, in the particular that assessments and taxation shall be uniform and equal, etc., because it involves a principle of right which the state is interested in having enforced. But the time of making such assessment, collecting such taxes, and the instrumentalities and agencies which cities having charters may therein provide for the accomplishment thereof, involves merely local and purely ministerial powers and duties, and in these particulars such cities are *not* "subject to" the constitution and laws of the state, because (1) they have these rights in the absence of a constitutional inhibition, and (2) the constitution affirmatively gives to them these rights in the formation of charters for their "own government."

The construction contended for by appellant is against the weight of authority, however, and is also against public policy, in our opinion. Substantially the same provision as the one quoted from our constitution is contained in the constitutions of California and Missouri, and in these states the right of the legislature to amend the charters of such cities has been recognized and is established. The constitution of California differs from ours in that it requires such charters and amendments thereto to be submitted to the legislature for approval or rejection, and for that reason appellant argues that the California cases are without force here. But in construing this provision the courts of that

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state have placed the right of the legislature to amend these charters upon the clause that such cities "shall be subject to and controlled by general laws," and it seems to us that the intention was to include all cities in said clause, from the language of the section, regardless of its construction elsewhere. *Thomason v. Ashworth*, 73 Cal. 73 (14 Pac. Rep. 615); *Ex parte Ah You*, 82 Cal. 339 (22 Pac. Rep. 929); *Davies v. City of Los Angeles*, 86 Cal. 37 (24 Pac. Rep. 771); *State, ex rel. Kansas City, v. Field*, 99 Mo. 352 (12 S. W. Rep. 802); *City of Westport v. Kansas City*, 103 Mo. 141 (15 S. W. Rep. 68); *Ewing v. Hoblitzelle*, 85 Mo. 64.

Appellant further contends that said act is void because it is in conflict with § 9 of art. 7 and § 12 of said art. 11 of the constitution, which are as follows:

"SEC. 9. The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same."

"SEC. 12. The legislature shall have no power to impose taxes upon counties, cities, towns, or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

Appellant quotes from the case of *Baker v. Seattle*, 2 Wash. 576 (27 Pac. Rep. 462), as follows:

"The constitution of the State of Illinois in 1848 contained the clause above quoted from article 7 [§ 9 of the constitution] *in haec verba*, and in that state there are many well considered cases which hold that it is incompetent for the legislature to directly lay any burden of taxation for

municipal purposes upon the cities of that state. See *People v. Mayor, etc.*, 51 Ill. 17. In other states not having such a constitutional provision the power of the legislature over municipal corporations has, in some cases, been held to be well nigh omnipotent, as in *Sage v. Brooklyn, supra*. We find no case, however, in which such a constitutional expression occurs as is contained in our article 11 [§ 12] above quoted, and whatever may be thought elsewhere of the Illinois decisions above quoted, they would seem to be cogent authority here."

And argues that similar legislation has been held void in Illinois under the provision mentioned, and he cites the following decisions from that state. *Hurward v. St. Clair, etc., Drainage Co.*, 51 Ill. 130; *People, ex rel. Wilson, v. Salomon*, 51 Ill. 37; *Lovington v. Wider*, 53 Ill. 302; *People, ex rel. Wider, v. Canty*, 55 Ill. 33; *Wider v. East St. Louis*, 55 Ill. 133; *Gage v. Graham*, 57 Ill. 144; *People, ex rel. Dunham, v. Morgan*, 90 Ill. 558; *Cornell v. People, ex rel. Walsh*, 107 Ill. 372. But an examination of these cases shows that the objections raised did not go to the valuation of property for the purposes of taxation, or to the mere collection of a tax. The objections were to the creation of debts which were to be satisfied by means of taxation, or were to the creation of a tax.

Respondent admits that the legislature has no power to authorize the officers of the county to levy a tax upon persons or property in the city of Seattle for corporate purposes of the city. But contends that the legislature may impose upon county officials the duty of collecting a tax levied by the city. He calls our attention to the fact that, subsequent to the decisions mentioned, the legislature of Illinois, under the constitution of 1870, containing substantially the same provisions in this respect as the constitution of 1848, enacted a law identical in purpose with the law under consideration here, and that for many years this act has remained the law of that state unquestioned.

The respondent contends that the argument of appellant rests upon an incorrect interpretation of the words "to assess and collect taxes" used in the provisions of the constitution of Washington. And he argues that as the power of taxation is a legislative power, and as all legislative power is by the constitution vested in the legislature, were it not for the said provisions of the constitution the legislature could tax municipal corporations for corporate purposes. That the right which is denied to the legislature is the power to *impose taxes* upon municipal corporations for corporate purposes. The power denied to the legislature is the power it is permitted to vest in the corporate authorities. The use of the word "but" after the denial of the power of the legislature requires this construction. That the expression "to assess and collect taxes" must then mean "to impose and collect taxes," and that this construction is indirectly sustained by the Illinois authorities. So long, therefore, as the tax is imposed by the corporate authorities, the evil sought to be avoided by the constitutional provisions is not incurred. Respondent contends that the expression "to assess" does not mean the making of an assessment in the sense of a valuation. The word assess has two meanings—(1) To charge; (2) to value. And if we substitute in the constitution the meaning of the expression for the expression itself, we have in the one case, sense, and the other, nonsense, thus:

1. "The legislature shall have no power to impose taxes upon . . . municipal corporations for . . . municipal purposes, but may, by general laws, vest in the corporate authorities the power to *charge* and collect taxes for such purposes."

2. "The legislature shall have no power to impose taxes upon . . . municipal corporations for municipal purposes, but may, by general laws, vest in the corporate authorities the power to *value* and collect taxes."

That the power to value taxes would be meaningless,

but the power to charge taxes is perfectly clear. The argument advanced by the respondent strikes us as sound, and we agree with him that it is the power to collect taxes which must be vested in the corporate authorities. And as the act makes it the *duty* of the treasurer to collect the tax levied, by so doing it vests in the corporate authorities of the city the power to collect by giving it the machinery for the collection. It by no means follows that because the corporate authorities are to be vested with the power to collect the tax, that therefore they must themselves be the machinery for its collection. The act of collection and the power to compel the act are not identical.

Appellant further contends that said act is in violation of § 8, article 11 of the constitution, which provides that "the salary of any county, city, town or municipal officer shall not be increased or diminished after his election or during his term of office," etc., and also § 25, article 2, which provides: "Nor shall the compensation of any public officer be increased or diminished during his term of office;" and also the first part of § 12, article 11, which denies to the legislature the right "to impose taxes upon counties, cities," etc.

Sec. 10 of this act of the legislature (Laws 1893, p. 170) provides that each city shall pay to the county treasurer for duties performed by him in the collection of city taxes \$500 per year, which shall be in addition to the salary otherwise provided by law. We do not think there is any conflict here, as the additional salary is not paid to the county treasurer as county treasurer, but new duties have been imposed upon him in the way of collection of city taxes, and the additional compensation is provided therefor, a matter which is entirely outside of his former duties as county treasurer for which his previous salary was fixed.

We doubt whether this provision can be held to be the imposition of a tax within the prohibition of the sections

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aforesaid; if it is, it would not render the entire act invalid, but would only annul the provision itself. Little importance seems to have been attached to this question by the appellant as it was not argued at the hearing and the point is simply stated in its brief without any argument.

It is further claimed that the act was repealed by the general revenue law, approved March 15th (Laws 1893, p. 385), which contains the following provision:

“SEC. 137. All acts and parts of acts heretofore enacted by the legislature of the Territory or State of Washington providing for the assessment and collection of taxes in this state shall be and the same are hereby repealed.”

If the legislature had intended by this act to repeal the previous act approved March 9th, it most likely would have done so in such a way as to leave no room for doubt. This repealing clause is evidently directed to laws relating to state taxation operating generally in all parts of the state, and not to a law like the one in question which is special in the sense that it applies only to cities of the first class, but which nevertheless does not come within the constitutional prohibition of special legislation, for it is general as affecting all of such cities.

The judgment of the superior court is affirmed.

HOYT and ANDERS, JJ., concur.

DUNBAR, C. J., and STILES, J., absent.

[No. 719. Decided April 26, 1893.]

WILLIAM H. GREENE AND LUCINDA H. GREENE, *Respondents*, v. LOUIS WILLIAMS, *Appellant*.

APPEAL—ORDER VACATING JUDGMENT.

An order setting aside a judgment is not a final order from which an appeal will lie.

Appeal from Superior Court, Clallam County.

L. M. Lane, W. R. Gay, and Louis Williams, for appellant.

R. C. Wilson, and Benton Embree, for respondents.

The opinion of the court was delivered by

SCOTT, J.—This appeal was taken from an order setting aside a judgment, and the respondents move to dismiss the same upon the ground that the same was not a final order from which an appeal will lie. We have so held in *Lilienthal v. Wright*, 1 Wash. 1 (23 Pac. Rep. 801), and in *Gower v. Gower*, 1 Wash. 16 (24 Pac. Rep. 29).

The appellant claims that under the circumstances of this case he has no relief unless his appeal can be maintained, but we do not find anything in the record to warrant this contention. He certainly has a right to have the cause proceed to final judgment in the superior court, and if such judgment should be adverse to him, an appeal can be taken therefrom.

Since the decision of *Lilienthal v. Wright* and *Gower v. Gower*, the law has been changed, in that it allows proceedings to be instituted to set aside and vacate judgments without any statutory limitation as to time, as was the case when those two decisions were rendered. The time for instituting such proceedings being unlimited by statute, the right to an appeal from an order vacating a judgment is much more important than formerly, and the absence of

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26	327
26	333

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such a right under some circumstances might be subversive of the ends of justice. It being a question of practice, had the law at the time those cases were decided been as it now is, it might have led the court to have held otherwise, but as the present legislative assembly has passed a law authorizing an appeal from an order granting a new trial, we do not deem it advisable or necessary to review our former holding. See Laws 1893, p. 119, § 1, subd. 6.

Consequently the motion is granted and appeal dismissed.

DUNBAR, C. J., and HOYT, ANDERS and STILES, JJ.,
concur.

[No. 565. Decided April 29, 1893.]

L. SAMUEL, *Appellant*, v. CHARLES H. KITTENGER *et al.*,
Respondents.

FRAUDULENT CONVEYANCES—DEED INTENDED AS MORTGAGE—
TRUST DEED—PREFERENCES—EVIDENCE.

A conveyance of land intended as a mortgage to secure an existing debt is not void as to creditors, in the absence of any showing that the value of the land is greatly in excess of the indebtedness which it is intended to secure.

A conveyance of property in trust for those to whom it equitably belongs can in no event be void as to creditors.

The fact that, within a few days after the conveyance of certain land for a given consideration, another conveyance is made of the same land, with additional land, to the same grantee and for the same consideration as expressed in the former deed, is not evidence of fraud.

A debtor, although in failing circumstances, may pay or secure any one or more of his creditors, to the exclusion of others.

Appeal from Superior Court, King County.

Allen & Powell, for appellant.

Preston, Carr & Preston, and *W. R. Bell* (*E. F. Blaine*, of counsel), for respondents.

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6	546
33*	609
37*	631
6	260
12	2
6	261
17	42
6	261
122	587

The opinion of the court was delivered by

ANDERS, J.—On March 16, 1891, the appellant obtained a judgment against the respondent, Charles H. Kittenger, in the superior court of King county, for the sum of \$2,233.87, and costs. Executions were issued, and returned by the sheriff unsatisfied; and thereupon the appellant brought this action against the respondents, alleging in his complaint the rendition of his judgment and the issuing and return of execution thereon, as above stated, and that after the said Charles H. Kittenger contracted the debt upon which the said judgment was rendered, and after the maturity thereof, he, on the 20th day of June, 1890, pretended to transfer and convey by deed to the respondent Van Tuyl, a large number of town lots and blocks, in Irondale Addition to the town of Kirkland, in King county and State of Washington, and described in the complaint; that afterwards, on January 8, 1891, the said Charles H. Kittenger pretended to transfer and convey by deed to the said Van Tuyl certain other described town lots situated in Jackson and Rainier Street Addition to the city of Seattle, in said county of King; that on or about September 16, 1889, the said Kittenger pretended to transfer and convey by deed to the respondents George B. Kittenger and Mary C. Kittenger, his wife, certain described real estate situated in said county and state; that the said Kittenger, on the 8th day of January, 1891, pretended to transfer and convey by deed certain real estate described in the complaint, and situated in King county, to the respondent C. S. Preston; that the said pretended transfers were made without consideration, and in pursuance of a conspiracy between the said Charles H. Kittenger and the said several grantees, with intent to hinder, delay and defraud the plaintiff and other creditors of said Kittenger, and in secret trust for the use of said Kittenger; that the said Charles H. Kittenger

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had not at the time of said conveyances, nor at the time of either of them, sufficient property remaining subject to execution to pay all of his just debts, and that by said conveyances he rendered himself wholly insolvent, and has not now, nor has at any time since said conveyances, had sufficient property subject to execution out of which said judgment could be made, and that the said transfers, and each and every thereof, were made with full knowledge on the part of said grantees of the insolvency of the said Kittenger, and with the intent to hinder, delay and defraud the plaintiff; that said Kittenger has equitable interests, things in action, and other property which cannot be reached by execution, and the exact character and form of which is unknown to the plaintiff and the knowledge of which is wholly within the conscience of said Kittenger, and that he also has debts due him from persons unknown to the plaintiff; that said Kittenger has not any property, other than that embraced in said conveyances, and the equitable interests, things in action, and other property which cannot be reached by execution, and the debts due him as aforesaid, out of which the said judgment could be satisfied in whole or in part.

And the prayer of the complaint is, that said transfers be declared fraudulent and void as against the plaintiff, and that the lands described in the several deeds of conveyance be decreed to be subject to the lien of the plaintiff's judgment, and that the said Charles H. Kittenger be adjudged to pay the plaintiff's judgment out of said equitable interests, things in action and other property which cannot be reached by execution, and debts due him, and all property held in trust for him, or in which he is in any way or manner beneficially interested, and that the said Kittenger be enjoined from transferring the property pending the suit, and that a receiver of all the property which cannot be reached upon execution be appointed, with authority and

instructions to sell the same and apply the proceeds thereof to the payment of plaintiff's judgment.

The respondents filed separate answers, admitting that the property described in the complaint was conveyed to the respective parties therein mentioned, at the times specified, but denying all other allegations of the complaint, except that the appellant commenced an action in the superior court and obtained a judgment therein against Charles H. Kittenger and the return of execution thereon unsatisfied, as alleged in the complaint.

Upon the issues thus framed the cause proceeded to trial. And after the plaintiff had introduced his testimony, and rested his case, the defendants moved the court to dismiss the action on the ground that the evidence was insufficient to sustain the allegations of the complaint. The motion was granted by the court, and judgment rendered in favor of the defendants for costs, from which the plaintiff appealed to this court.

The appellant insists that the ruling of the court is erroneous, and whether or not his contention is tenable, can only be determined by a review of the evidence in the record. The burden of proving the fraudulent intent alleged was upon the appellant. And, as he was opposed at the outset by the presumption of honesty and legality that prevails in favor of the ordinary business transactions among men, it was incumbent upon him to prove, by clear and satisfactory evidence, that the conveyances which he assailed were in reality fraudulent and void as to him. *Bump, Fraud. Conv.* (3d ed.), 600, 604, 605, and cases cited. *Wagner v. Law*, 3 Wash. 500 (28 Pac. Rep. 1109). And if he has not done so, the action was rightfully dismissed. It will be observed by an examination of the complaint that the action is divisible into as many distinct branches as there are respondents and transfers. And we will, therefore, first examine the evidence adduced by the appellant

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which is specially applicable to each of the transfers, as if that particular branch of the case stood alone, and afterwards consider that which is pertinent to the case as a whole.

As to the transfer of the lots in Irondale Addition to Kirkland to Van Tuyl, the facts as disclosed by the testimony of appellant's witness are briefly as follows: Some time before the execution of the deed to Van Tuyl, the respondent Charles H. Kittenger, together with three other individuals, purchased an eighty acre tract of land near Kirkland, and subdivided it into lots and blocks, and platted it as a town plat. They borrowed the money used in the purchase from the banking house of Dexter Horton & Co., and gave the bank, or one of its officers for it, their note and a mortgage on the property to secure the payment thereof. The title from their vendor was taken in the name of C. H. Kittenger by agreement between the parties interested. On June 20, 1890, in order to remove the mortgage and thereby facilitate the transfer of lots, and at the same time not deprive the bank of its security, the property, except some portions thereof which had been conveyed to other parties, was conveyed by Kittenger to the respondent Van Tuyl, who was the cashier of the bank, by deed in which the consideration stated was one dollar. No money whatever was paid by Van Tuyl to Kittenger for the conveyance, but it was agreed between the parties interested in the property that the transfer should be made, and that Van Tuyl should hold the land, as a trustee, to secure the bank for the sum loaned to the said purchasers, which then amounted to something over eight thousand dollars; and also in trust for the four owners whose interests were equal and undivided. A declaration of trust was duly executed and delivered evidencing this agreement, but it was never recorded.

It further appears that about this time the respondent

C. H. Kittenger was indebted to the bank in the sum of about \$14,000 besides his liability on the joint note above mentioned; and it was agreed between the bank, Kittenger and Van Tuyl that the latter should hold Kittenger's interest in the property as security for the payment of this additional indebtedness to the bank. This latter agreement was evidenced by a written instrument—an assignment, so-called—of Kittenger's interest to the bank, but which was not introduced in evidence, although the paper seems to have been before the court at the trial and marked for identification. After the delivery of the deed to Van Tuyl the purchase money mortgage was canceled. What the value of the Irondale lands was at the time of the conveyance to Van Tuyl, cannot be definitely ascertained from the evidence. The witnesses fix the price of lots some time after the transfer at from fifty to one hundred and fifty dollars each, according to size, and the value of the land per acre at from \$250 to \$500, but state that these values were speculative, merely, depending upon the prosecution of some manufacturing enterprise that had been projected in that vicinity. No actual sales were shown, and, in fact, one of the witnesses testified, in effect, that he did not think that cash sales could have been made at the time. Neither the number of the lots in each block, nor the size of the lots, nor the number of acres of land embraced in the deed, are shown, and there is therefore no substantial basis upon which the value of the property can be intelligently estimated. When the deed in question was given to Van Tuyl he had no knowledge of the existence of the appellant's claim against Kittenger, and no notice of any intent on his part to defraud the appellant or any other person.

The above is the substance of all the evidence pertinent to the conveyance under consideration, and we think it fails to show any actual fraud either on the part of Charles

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H. Kittenger or Van Tuyl. The fact that Van Tuyl sold a right-of-way through the lands transferred to him to a railroad company and applied the proceeds in part payment of the joint note held by the bank, is only material in so far as it tends to show that he was endeavoring to comply with the provisions of the declaration of trust.

In respect to the transfer of the Jackson and Rainier street property by Kittenger to Van Tuyl, the appellant proved, by the deed which he introduced in evidence, that on January 8, 1891, Kittenger conveyed the property to Van Tuyl for an expressed consideration of \$5,000, and that the deed was recorded on the following day at the request of Kittenger, and he further proved by Van Tuyl that he paid nothing for the deed and knew nothing concerning it until a short time afterwards when Kittenger informed him of its execution, and stated, in effect, that the property had belonged to his two brothers and himself, and that he, Kittenger, had received his share from sales made, and that his brothers were the equitable owners of the property. Van Tuyl thereupon agreed to hold the property for the owners thereof. No evidence was introduced in reference to this deed, tending to show that the property was to be held for the benefit or use of the grantor, or that Van Tuyl had any knowledge whatever that the transfer was designed to place the property beyond the reach of Kittenger's creditors. And, while the transaction was an unusual one, still we are not prepared to say, under the state of facts disclosed, that the conveyance ought to be declared illegal. Only those transfers which are inhibited by law are void. And a conveyance of property in trust for those to whom it equitably belongs can in no event be void as to creditors for the reason that their equities cannot be paramount to those of the *cestuis que trust*.

The only proof offered concerning the transfers to George B. Kittenger and wife was the deeds which show that, on

September 16, 1889, C. H. Kittenger and wife made their deed of the property therein described, to George B. Kittenger and wife, for the expressed consideration of eight thousand dollars, which deed was recorded on October 5, 1889, at the request of the grantee, and that on September 28, 1889, the said C. H. Kittenger and wife made their deed of the same property, together with other lands, to George B. Kittenger, in which the consideration of eight thousand dollars was expressed, and which deed was also recorded on October 5, 1889, at the request of the grantee. Certainly these conveyances could not well have been declared fraudulent and invalid by the learned judge who tried this cause, upon this evidence alone.

The deed of C. H. Kittenger and wife to C. S. Preston, purporting to convey to him the lots in Irondale Addition to Kirkland was, as the evidence discloses, in fact, made in trust to secure an existing indebtedness of Kittenger to E. M. Carr and Harold Preston, for cash advanced and legal services theretofore rendered. The amount of this indebtedness at the time of the transfer, as shown by the books of Carr and Preston, was between three and four hundred dollars, but the exact sum was not stated. Nor can the real cash or market value of Kittenger's interest at the time be deduced from the testimony, although the speculative and contingent value of one-fourth of the property was far in excess of the debt secured. The evidence negatives the idea that Preston took the conveyance with a secret trust to hold the surplus for the use of Kittenger, or with any intention or design of preventing the creditors of Kittenger from reaching such surplus. He paid nothing for the conveyance, and simply held the property for the benefit of these creditors whom Kittenger desired to prefer over others. Our statute denounces as fraudulent and void such conveyances only as are made in trust for the use of the grantor. Gen. Stat., §1452. And where

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there is no such trust agreed upon or understood between the parties, but the object of a transfer of property is to pay or secure the payment of a debt, the transaction is valid, although the effect may be to preclude the creditors from subjecting the property to the payment of their claims against the common debtor. A debtor, although in failing circumstances, has a right, if he sees fit, to pay or secure any one or more of his creditors, to the exclusion of others. *Turner v. Iowa National Bank*, 2 Wash. 192 (26 Pac. Rep. 256).

The method adopted by Kittenger to secure this debt is open to suspicion, and is not to be commended, but upon the proof made we do not feel warranted in declaring the transaction void.

In addition to the foregoing testimony relating specially to the several transfers which the appellant alleges are fraudulent and void, the appellant proved that Charles H. Kittenger, subsequently to the time when he became indebted to the appellant, made other transfers of property, both personal and real, to trustees in some instances, and that several actions were commenced against him and prosecuted to judgment in the superior court. And upon the whole evidence in the record the learned counsel for the appellant insist with much earnestness that the judgment ought to be reversed.

In order that a deed may be declared fraudulent and void as to creditors it is indispensably necessary, as before intimated, to satisfy the court that it was made with a fraudulent intent on the part of the grantor; and the question of intent is generally one of fact and not of law. Where, however, the intent of the parties may be gathered from the face of the instrument itself, and the natural and inevitable consequences of its provisions is to hinder, delay or defraud creditors, or where an insolvent makes a voluntary conveyance of the property, the instrument is void as

a conclusion of law. Bump, Fraud. Conv. (3d ed.), 22, 23; see, also, *Williams v. Evans*, 6 Neb. 216.

The conveyances sought to be set aside as fraudulent in this case are not void upon their face, nor have either of them been shown to be voluntary merely, and hence the question to be determined is one of fact to be established by the proofs. It is specially urged, however, on behalf of the appellant, that a deed absolute in form but intended to operate as a mortgage is fraudulent and void as to the grantor's other creditors. Upon this proposition the decisions of the courts are not uniform, but we think the weight of authority is in favor of the doctrine that such conveyances, where given in good faith and to secure an actual indebtedness, are not constructively fraudulent. *Ross v. Duggan*, 5 Col. 85; *McClure v. Smith*, 14 Col. 297 (23 Pac. Rep. 786); *Muchmore v. Budd*, 53 N. J. Law, 369 (22 Atl. Rep. 521); Bump, Fraud. Conv. (3d ed.), 41, and cases cited; Wait, Fraud. Conv., § 238; *Warren v. His Creditors*, 3 Wash. 48 (28 Pac. Rep. 257).

A careful consideration of the whole evidence in the case fails to satisfy our minds that the decision of the court below was wrong, and the judgment is, therefore, affirmed.

DUNBAR, C. J., and SCOTT and STILES, JJ., concur.

HOYT, J., not sitting.

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[No. 785. Decided April 29, 1893.]

In the matter of the Guardianship of Seymour Wetmore :
Appeal of WILLIAM H. REEVES, Guardian.

HABITUAL DRUNKARD — APPOINTMENT OF GUARDIAN — WHEN
WANT OF JURISDICTION CURED.

The appointment of a guardian for the person and estate of one whose mind has become unsound from the constant and excessive use of alcoholic liquors, thereby rendering him incapable of conducting his own affairs, is authorized by §1154, Code Proc. (Hoyt, J., dissents.)

Although the court did not have jurisdiction to appoint a guardian for a habitual drunkard, for the reason that the latter was not before the court at the time, yet where, without attacking the proceedings, he subsequently submits himself to the jurisdiction of the court by filing a petition denying the allegation of the original petition, and asking for an investigation upon the merits and for an order setting aside the appointment of such guardian, the court thereby obtains jurisdiction of his person, and from any final order in the premises appeal will lie. (Hoyt and Stiles, JJ., dissent.)

Appeal from Superior Court, King County.

Winsor, Farwell & Morris, for appellant.

Snell & Johnston, and *Fred H. Peterson*, for respondent.

The opinion of the court was delivered by

SCOTT, J.—On July 14, 1892, appellant was, by the superior court of King county, HUMES, J., presiding, appointed guardian of the person and estate of the respondent Seymour Wetmore, and thereafter qualified and entered upon the discharge of his duties as such guardian. In September following, the respondent filed his petition in said superior court asking that the order appointing such guardian be set aside and vacated.

The foundation of the original petition asking for the appointment of said guardian was upon the following grounds: That the said Seymour Wetmore was and had

been for a long time continually and excessively addicted to the use of alcoholic liquors as a beverage, and had become and was a habitual drunkard, and that by reason thereof, and of his long continued dissipation, he had become, and then was, totally incompetent and unfit to transact his own business and to conduct his own affairs. That he was possessed of an estate of the value of sixty-four thousand dollars, and that he was squandering the same recklessly and extravagantly by reason of his mismanagement and habits of recklessly expending and squandering money with dissolute companions and otherwise.

The petition of said Seymour Wetmore was filed as an answer to these allegations, denying the same except that he was possessed of an estate, etc., praying for a hearing thereon, and asking that the original proceedings be quashed and set aside to the effect that his estate might be returned to him and be placed under his own management.

Said last petition came up for hearing before the equity department of said superior court on the 19th day of September, 1892, LICHTENBERG, J., presiding. The respondent was called and testified. Whereupon one Dr. Walsh, a physician, was called by respondent as a witness, and was asked a question by his attorney as to the sanity or insanity of the respondent. Whereupon counsel for appellant stated that there was no question of sanity or insanity in the case, and that unless the law authorized the appointment of a guardian for persons incapable of conducting their own affairs other than insane persons, that the proceeding must be dismissed. The record does not very clearly show the reasons which led the court to take the action it did take in the premises. We think, however, the claim of the appellant is fairly maintained, which is that upon the admission that appellant did not propose to prove that the respondent was insane, the court held it had no jurisdiction to proceed in the premises on the ground

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that the law did not authorize the appointment of a guardian for other than an insane person. The testimony and conduct of the respondent was not such as would have commended him to the court as a competent person to take care of himself. In fact it seems to us that the contrary may be very strongly inferred from his own testimony, and that it appears therefrom that he was grossly incompetent and entirely unfit to care for his property; that he was squandering the same in a reckless and riotous manner of living and upon dissolute persons, and was speedily traveling the road to penury, as well as injuring himself by reason of his excesses.

No further witnesses were called by either party, nor was any further evidence offered, nor does it appear that the case was submitted to the court upon the merits, as the respondent claims, or that there was any argument thereon other than upon the law point involved, nor did either side rest upon the merits, but the court directed the previous proceeding appointing the guardian to be vacated and set aside, whereupon said guardian excepted and appealed.

The act in question is to be found at ch. 15, title 12 of the Code of Procedure, the same having been carried from ch. 110 of the Code of 1881, commencing at p. 276. Sec. 1154 of the present Code, being § 1631 of the 1881 Code, except as changed by substituting superior courts for probate courts, provides that such courts shall have power to appoint guardians to take the care, custody and management of all idiots, insane persons, and all who are incapable of conducting their own affairs, and of their estates, real and personal, the maintenance of themselves and families and the education of their children.

An act to provide for the management of hospitals for the insane, approved March 13, 1890, to be found at p. 482 of the Session Laws of 1889-90, was evidently thought by the compiler to have repealed certain sections contained

in the chapter found in the Code of 1881, and the same are not carried forward in the present compilation. The question as to whether the same are repealed or not is immaterial here. It will, however, be necessary to refer to them to some extent to assist in arriving at the scope of the act, for the repeal of the sections omitted did not limit the range or scope of the remainder of the act so as to exclude the class in question therefrom, if it was originally included.

The language of the act is somewhat obscure; for instance, idiots, insane persons and all who are incapable of conducting their own affairs are mentioned in the first section as persons for whom a guardian may be appointed. In the next section, 1632 of the 1881 Code, it is stated, upon the application of any person setting forth that any person by reason of insanity is unsafe to be at large or is suffering under mental derangement, that the court shall cause such person to be brought before it for the purpose of examining into the sanity or idiocy of such person, and throughout said section such person is alluded to as such insane or idiotic person. The next section, 1633, speaks of such insane person only. Section 1635 says that, if it be found by the court that the person so brought before it is of unsound mind and incapable of managing his own affairs, the court shall appoint a guardian for the estate of such insane person. Section 1636 speaks of such person found to be insane or coming within the provisions of this act, etc. Section 1637, in dealing with the same subject, designates such person as an insane person only.

It is evident that the word "insane" as used here was intended to cover every person for whom a guardian might be appointed under the provisions of the act, and that it was meant to include idiotic persons and, as well, all who were incapable of managing their own affairs by reason of any unsoundness of mind due to whatever cause. The in-

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tent of the law was evidently to include all such persons, to the end that all such might be properly cared for, and that their estates might not be squandered, and such persons thus made to become a public charge, and it was not simply to provide relief only in cases of insane persons or of insane or idiotic persons. The object of the law was to make such a provision in all cases, and not to draw a distinction between classes. There would be no reason for any such distinction, while otherwise the object is clearly apparent. Consequently, we are of the opinion that the law as it stands, and as embraced in § 1154 aforesaid of the present code, is adequate to authorize the appointment of a guardian for any person of such unsoundness of mind as to be incapable of conducting his own affairs, etc., and that the learned court below erred in holding otherwise.

Some preliminary questions were presented at the hearing, one of which was a motion to dismiss the appeal on the grounds that said order vacating the order appointing the guardian was a discretionary one, resting wholly within the discretion of the lower court, and was not an order from which an appeal could be taken. But the court, being of the opinion that an appeal would lie therefrom, denied the motion.

It was contended by the appellant that, as the order appointing a guardian had been originally granted by HUMES, J., who was one of the judges of said court, LICHTENBERG, J., another judge of said court, had no jurisdiction to entertain the subsequent proceeding which was in effect an attack upon the first, and appellant contends that it resulted in a clashing of authority between the judges of the same court, and that one judge of a court had no right to undo what another judge had done. We do not find anything in the record, however, to warrant this contention. It appears that this proceeding belonged to, and was originally instituted in, the equity department of said court, which

was generally presided over by LICHTENBERG, J., but at the time the original petition was presented and came on for hearing said judge was absent, and HUMES, J., was temporarily presiding therein, and consequently heard and disposed of the matter, and that when the subsequent petition by respondent was filed asking for a reopening of the matter, and a vacation of the previous order, LICHTENBERG, J., was then presiding over his regular department of said court, and the matter came on properly for hearing before him. There was no such undignified spectacle presented as an attempt upon the part of one of said judges to counteract the will and purpose of the other, and we are not required to pass upon any such question. On the contrary, said matters were heard and disposed of regularly in an appropriate manner, so far as the presiding judges were concerned.

It further appears from the record, although no question is properly raised thereover by the respondent, nor was one raised by him at any time in said proceeding, that the respondent was not present at the hearing first had when said guardian was appointed. Process had been served upon him citing him to appear, which for some reason he did not see fit to do. We are of the opinion that the court had no jurisdiction to proceed, not having the respondent personally present at the time. A mere service of a notice to appear in such cases, it strikes us, is clearly insufficient. It is inconsistent, certainly, to charge him with being incapable of managing his own affairs and at the same time hold him responsible for a failure to appear to protect his own rights in the premises. The act is silent as to the issuing of any process to bring such person before the court. Sec. 1155, being § 1635 of the 1881 Code, says if it be found by the court that the person *so brought before it*, etc. Sec. 1632 of the 1881 Code, which, as stated, is omitted from the present compilation, directed the court

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to cause such person to be brought before it at such time or place as it should direct, but was otherwise silent as to the manner of bringing such person before the court. Regardless of this, or of the absence of any other special provisions in the chapter, the court has the inherent power to cause such person to be apprehended and brought before it upon its order, and this should be done in all cases.

Here, however, the proceedings were not attacked upon this ground, but the respondent voluntarily came in and submitted himself to the jurisdiction of the court, and asked for a hearing upon the merits. He filed a petition denying the allegations in the original petition, alleging reasons why he was not present at the previous hearing and asked for an investigation upon the merits and that said order appointing such guardian be set aside. Under the circumstances, we are of the opinion that the court at that time obtained jurisdiction over his person, and, being of the opinion that the superior court erred in holding that the law does not authorize the appointment of a guardian for any other than an insane or idiotic person, its ruling in the premises is reversed, and the cause is remanded for further proceedings.

Upon the argument of the case here the appellant came in with a reply brief but recently filed and long after the time therefor had expired, the same having been placed on file without the consent of the court, and without any notice to the respondent. For these reasons the respondent moved to strike said brief from the files, and his motion was granted, and consequently the appellant will not be allowed to recover costs for such reply brief.

DUNBAR, C. J., and ANDERS, J., concur.

HOYT, J. (*dissenting*).—I think the order of the lower court should be affirmed. It is clear to me that, at the time Judge HUMES made the order which was vacated, he had no

jurisdiction whatever to do so. If this was the case, the order was not simply voidable, but was absolutely void, and could have been attacked collaterally. If this were so, I do not think that it should be held that the person against whom such order was made had given it validity by appearing in the proceeding, even although he did not attack it upon the ground of the want of jurisdiction of the court to make it. So soon as the attention of the court was called to the fact that such order was made without jurisdiction, it became its duty to clear its records of such void order by vacating it, and as that was the legal effect of the order from which this appeal was taken, it follows that, whether or not the reasons given by the court were sufficient, its action was correct, and should be affirmed.

This consideration alone is sufficient to determine the appeal; but, in my opinion, if the hearing had upon the motion to vacate was to be considered as an original hearing of the petition for the appointment of a guardian, and the merits of such petition properly a subject of decision therein, the ruling of the lower court was correct.

I do not think that the statute under which the proceeding was had was designed to protect the estate of one who voluntarily, for a brief time, incapacitates himself so that he cannot properly look after the same. The whole tenor of the statute and of the remedy provided, and the means by which the proceeding could be terminated, to my mind show clearly that the legislature intended it only to be applied to those cases of insanity or imbecility, or to causes of like nature, which might be presumed to be, at least to a certain extent, permanent. Under the statute, the guardian could only be appointed when the person was incapable of managing his own affairs for the reasons stated therein, and just as soon as the incapacity was removed he was entitled to have the appointment set aside. Such being the provisions of the statute, they cannot well be applied to a

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case of drunkenness, whether habitual or otherwise. A person for this reason might be totally incapable of managing his affairs one day, yet entirely capable the next. The result would be, if this statute is held to be applicable to such cases, that the court could be called upon one day to appoint a guardian for such person, and would have no discretion excepting to do so, and on the very next day might be called upon to vacate such appointment, and be likewise without any legal discretion to refuse. I do not think that the legislature intended that the courts should be thus engaged from day to day in this business of appointing and discharging guardians. A man may be a habitual drunkard, and a portion of the time as completely incapable of managing his own affairs as though he were absolutely insane, and yet, during the remainder of the time, perfectly competent, and the alternations of competency and incompetency may occur not only from day to day but even from hour to hour.

Beside, I have serious doubts whether the statute as it now stands is of any force or effect excepting as taken in connection with the power of the court to commit to an insane asylum, but this latter question it is not necessary to raise in this case.

STILES, J. — I concur with what Justice HOYT says upon the jurisdictional question, but as to the remainder of the case I am with the majority.

[No. 787. Decided April 29, 1893.]

FRANK LADOUCEUR, *Respondent*, v. NORTHERN PACIFIC
RAILROAD COMPANY, *Appellant*.

RAILROADS—INJURIES AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

A person injured by collision with a train at a railroad crossing is not chargeable with contributory negligence, if he looks for the train before driving upon the track and cannot see it by reason of intervening trees and embankments, nor hear it on account of the rattle of his own and other vehicles upon the roadway. (STILES and HOYT, JJ., dissent.)

Appeal from Superior Court, King County.

Action by Frank Ladouceur against the Northern Pacific Railroad Company for injuries received as the result of a collision between a train and plaintiff's wagon at a railroad crossing. The evidence tended to show that numerous teams were passing to and fro at the time on the street; that the train was making but little noise; and that the engine bell was not rung, nor the whistle blown, till almost upon the crossing. The plaintiff testified that he listened carefully for a train but heard none; that he looked both ways, listening for a train. The evidence further tended to show that there were embankments, trees and brush along the railroad track, in the vicinity of the crossing, from ten to twenty feet high, which obstructed the view of the train from the traveler upon certain portions of the highway.

Ashton & Chapman, and *Andrew F. Burleigh*, for appellant.

Bausman, Kelleher & Emory, for respondent.

The opinion of the court was delivered by

SCOTT, J.—This case was formerly before the court (4 Wash. 38, 29 Pac. Rep. 942) upon an appeal taken by

the plaintiff from a judgment of non-suit rendered against him on the ground of contributory negligence. The case was reversed and remanded, and was again tried in the superior court, and a judgment rendered in favor of the plaintiff, whereupon the defendant brings this appeal.

The only grounds of error alleged are that the verdict is against the evidence, and that from the whole evidence it appears that plaintiff is chargeable with contributory negligence. These grounds are not well taken. The case presented by the plaintiff is, if anything, stronger than that presented upon the former appeal, and the decision rendered upon that appeal is conclusive of this one.

There is now testimony to show that the plaintiff did look for a train while on the level space before going down the incline, and that he did not see any. There was no such testimony in the record before. The evidence is abundantly sufficient to sustain the verdict, and the jury were the judges of the truthfulness of it. In our opinion there is nothing in the case to show that the plaintiff is necessarily chargeable with contributory negligence. The case was evidently submitted to the jury under favorable instructions for the defendant, as no point is raised over any ruling of the court throughout the trial in any particular.

It follows that the judgment must be affirmed.

DUNBAR, C. J., and ANDERS, J., concur.

STILES, J. (*dissenting*).—It is true that upon the re-trial of this case the plaintiff himself *said* he looked for a train and did not see any, when he was some sixty feet away from the track; but it is also true that, both from his own evidence and from testimony which was uncontradicted and stands unchallenged upon argument of the case, it clearly appeared, that having nothing whatever else to do or think of, if he had turned his head to the southward for

one instant after he got within twenty feet of the track he could have seen the train during all the time after it passed a point over four hundred feet from him. Yet during all this time he kept his face to the north, where he could plainly see that no danger threatened, and let his horses drag along at a pace, as he says, not exceeding a mile an hour. If this conduct did not contribute to his injury and directly cause it, I am unable to imagine a case where the rules of contributory negligence can apply.

The verdict of the jury was not only against the clear preponderance of the evidence, but it ignored both the evidence and the charge of the court, and ought not to be sustained.

HOYT, J., concurs.

[No. 857. Decided April 29, 1893.]

F. L. LESLIE, *Appellant*, v. W. W. WILSHIRE *et al.*, *Respondents*.

CORPORATIONS—INSOLVENCY—PREFERRING CREDITORS—UNAUTHORIZED CONTRACTS—ESTOPPEL.

A chattel mortgage given by a dairy association cannot be held void on the ground that it is a preference of creditors by an insolvent corporation, when the evidence shows that the association had not enough money on hand to pay all of its indebtedness, but that its business was profitable; and that the mortgage was given for the purpose of inducing the mortgagee to continue to supply milk to the association, in order that its business might be carried on.

Although a contract of a corporation may not have been properly authorized by its board of trustees, yet, where the corporation continues to receive the benefits accruing from such contract, it is estopped to deny the validity thereof.

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Appeal from Superior Court, King County.

Burleigh, Gamble & Burleigh, for appellant.

George E. de Steiguer, for respondent Wilshire.

The opinion of the court was delivered by

SCOTT, J.—In September, 1891, certain persons, then severally engaged in supplying milk to customers in the city of Seattle, organized a corporation known as the Seattle Dairy Association, for the purpose of joining their interests and continuing said business. Contracts were made with farmers who were producers of milk to furnish to the association a certain number of gallons of milk at a specified rate extending over a period of several months, or a year. Such a contract was made with Malcolm McDougall, the assignor of the appellant. Subsequently, the price of milk having fallen, the association desired to be relieved therefrom. McDougall consented to give up his contract upon condition that he should be paid for the milk he had already supplied, and that a part of the stock of such association (which, owing to a resolution to the effect that milk would be taken from stockholders only, he had taken to enable him to enter into the contract) should be repurchased by the association. After some negotiations, it being deemed to the advantage of the association by the persons managing its business that so large a supply of milk should not be cut off suddenly, it was agreed between the association and McDougall that he should accept security for the amount due, and should continue to furnish milk at reduced rates; and on the 10th of February, 1892, a note and chattel mortgage to secure the same were executed to him by the president and secretary of said association. The amount so secured was \$1,700. This covered the existing indebtedness, and also such sum as would become due for milk for the remainder of the month

of February. Thereupon McDougall continued to furnish milk to the association, which it received during said month of February. The previous contract between McDougall and the association was canceled and delivered up.

From the time of giving such mortgage up to the 24th of March following, the association continued in business, buying milk and selling the same to its customers. At that time attachment suits were brought by some of the stockholders of the corporation, which resulted in closing up its business. Foreclosure proceedings upon the mortgage were instituted by plaintiff, to whom the same had been assigned. The court found that the association was insolvent at the time the mortgage was executed, and that it was given for the purpose of preferring a creditor, and was void, and decreed that all the property of the association should pass into the hands of a receiver, to be distributed equally among all the creditors, whereupon the plaintiff appealed to this court.

The ground upon which the court rendered its decision seems to have been the main point in controversy, although it is contended that the mortgage was not properly executed. Upon this point the court made no finding. There was no resolution of the board of trustees authorizing the execution of the mortgage, but it fairly appears that a majority of the trustees participated in giving it, and, after a knowledge of its execution, the association continued to receive the benefits of the contract secured thereby. Subsequently, at a meeting of a majority of the board of trustees, the giving of said mortgage was expressly ratified. It is contended that this meeting was irregular, because the same had not been properly called. However this may be, the association is otherwise estopped from denying the validity of the mortgage. The manner in which it was executed even seems to have been about as regular as were its business transactions generally. There is little or no

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controversy as to the law applicable to the case, the contention being over the proof. After an examination of the evidence we do not think there is sufficient in the record to warrant the finding that the association was insolvent when the mortgage was given, and that it was given for the purpose of preferring McDougall's claims. The association was embarrassed to some extent, and had not enough money on hand to pay all of its indebtedness, but its business was then regarded as a profitable one, and its evident purpose at that time was to continue it, and the mortgage was given for the purpose of inducing McDougall to continue to supply milk to the association, in order that its business might be carried on. We think this is well established from the proofs. He had been paid up to the month preceding the giving of the mortgage.

We are satisfied that the judgment holding appellant's mortgage void is erroneous, and it is reversed to that extent, and the cause is remanded, with instructions to enter a decree giving said mortgage full force and effect.

DUNBAR, C. J., and HOYT and STILES, JJ., concur.

ANDERS, J., not sitting.

[No. 879. Decided April 29, 1893.]

In the Matter of the Estate of Ellen K. Hill, Deceased:
STEWART E. SMITH, *Administrator, Respondent*, v. ELISHA
P. FERRY *et al.*, *Executors, Appellants*.

EXECUTORS AND ADMINISTRATORS — ADMINISTRATION BY HUSBAND'S EXECUTORS UPON COMMUNITY PROPERTY — WHEN ADMINISTRATOR OF WIFE'S ESTATE ESTOPPED.

Where a husband acts as executor of a deceased wife's will, but, at the time of his death, has not completed administration upon her estate, and the executors of his own will take possession and ad-

minister upon all the property the husband held, including the separate and community estate of the deceased wife, such administration by his executors is merely irregular and not void, nor do the ordinary rules relating to the liability of executors *de son tort* apply thereto.

In such a case, although it is proper that the community estate should be administered upon by the legal representative of the wife, she having died first, yet where an administrator with the will annexed has been appointed for the wife's estate subsequent to the death of the husband, who was acting as executor thereof, and such administrator does not proceed with diligence to obtain possession of the community property, but sits by for a year and a half and sees the same administered in the settlement of the estate of the husband, such administrator is estopped from setting up any claim of right to administer the community estate.

Appeal from Superior Court, King County.

Hughes, Hastings & Stedman, for appellants.

Isaac M. Hall, for respondent.

The opinion of the court was delivered by

SCOTT, J. — The respondent filed his petition in the probate department of the court below, praying that the appellants, as executors of the last will and testament of George D. Hill, deceased, be ordered to render an account of the community estate of Ellen K. and George D. Hill, both deceased, and to surrender up and deliver the same over unto the said petitioner to be administered by him as the administrator *de bonis non cum testamento annexo* of the last will and testament of Ellen K. Hill. To this petition the appellants demurred, and the demurrer being overruled and an order being entered in favor of said petitioner as prayed, appellants elected to stand thereon and have perfected their appeal from said order to this court.

The facts as shown by the petition and confessed by the demurrer are briefly stated as follows: On the 14th day of February, 1887, Ellen K. Hill died testate at the city of Seattle, where she had for many years resided with her

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husband George D. Hill, and whom she appointed executor in her will. On the 2d of November, 1887, upon the petition of her husband, said will was duly admitted to probate and recorded as the last will and testament of said deceased, and certificates of such probate and record were granted and recorded as required by law. George D. Hill qualified as such executor, and letters testamentary were issued to him out of said court on the 12th day of November, 1887, and he thereupon entered upon the discharge of his trust as such executor, and so continued until the date of his death, to wit, on December 4, 1890. In the meantime the said George D. Hill had proceeded with the administration of the said estate, and had partially administered and settled the same, and had partially administered the community property which belonged to the estate of said decedent and her said husband George D. Hill. No steps were taken to give notice to the creditors of the said community, or to bind them in anywise by the proceedings had in the administration of the estate of said Ellen K. Hill. Upon the death of George D. Hill, his trust as executor of the last will and testament of Ellen K. Hill was left incomplete and unfinished. He left a will nominating the appellants as his executors, and the said will was afterwards, in the month of December, 1890, duly admitted to probate in the then probate court of King county, and letters testamentary were duly and regularly issued to these appellants, who, having regularly qualified, entered upon their trust as such executors, and have ever since been, and still are, the duly qualified and acting executors of the last will and testament of the said George D. Hill, deceased, and their letters have never been revoked. Said executors thereupon entered into the possession of all the property in the hands of their intestate at the time of his decease, which embraced a large amount of community property of the said Ellen K. and George D. Hill, and the separate property of Ellen K. Hill

not disposed of by George D. Hill in the progress of the administration of her estate. They thereupon, and more than a year prior to the filing of the petition of respondent in the court below, published notice to creditors; and the creditors of the estate of the said George D. Hill, and of the community estate of the said George D. and Ellen K. Hill, have filed claims against said estates with said executors, amounting to nearly one hundred thousand dollars, the greater portion of which are asserted by said claimants to be community debts and binding upon the community estate. Afterwards, on June 30, 1891, letters of administration *de bonis non* of the estate of the said Ellen K. Hill, with the will annexed, were granted by the superior court of King county, and duly and regularly issued to the petitioner Stewart E. Smith, who ever since has been and still is the duly appointed and qualified administrator *de bonis non*, with the will annexed, of said estate. The appellants, as executors of the said last will and testament of George D. Hill, hold the possession of the separate estate and the community estate of George D. and Ellen K. Hill, deceased, and are proceeding to administer said community estate, and have already disposed of a large portion thereof in the regular course of administration, claiming the right so to do under provisions of the will and the direction of the superior court of said county sitting in probate. Her separate property had been delivered to the petitioner before the institution of this proceeding. On the 16th of December, 1892, the petitioner served upon appellants a demand in writing requiring them to surrender up and deliver over to said petitioner all the property and assets whatsoever belonging or pertaining to the said community estate, but appellants refused to comply with the said demand and still refuse so to do.

In *Ryan v. Fergusson*, 3 Wash. 356 (28 Pac. Rep. 910), we held that upon the death of either husband or wife,

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where an administration was had of the community property, that the same should be of the whole thereof, and not merely of the half interest of the decedent, and that the whole community estate is subject to administration upon the death of either of the parties.

Where the separate property of the deceased, and the community property of the deceased and the surviving spouse, is administered, the same should be kept separate, for the separate debts of the deceased would be primarily a charge upon the separate property, and the community debts would be primarily a charge upon the community property. In case there should not be enough of the separate property to pay the separate debts, the deficiency could be made good out of the decedent's interest in the community property, should there be anything remaining after the payment of the community debts, and the same would be true with regard to a deficiency of the community property, as after the separate debts had been paid the remainder of the separate property would be liable for the community debts so remaining unpaid. However, where administration has been had of the separate property of the deceased, and the whole of the community property, or even only of the half interest of the community property belonging to the deceased, and the same has not been kept separate, but the property has been commingled indiscriminately, and the separate debts of the deceased and the community debts have not been classified or kept separate, but have been dealt with in common as standing upon an equal footing against all of the property, regardless as to whether it was the separate property of the deceased or the community property, or a part of it, and the same has been allowed to go through unquestioned by the creditors, or any of them, or any of the parties interested, such administration at most would only be irregular, and not void.

We are also of the opinion that administration may be

had of the separate property only of the deceased member, if no more is required by the creditors, or by the parties interested. As to how far creditors of the community would be estopped where the community property is administered upon the death of the wife, for instance, or where only one-half of the community property has been so administered, from thereafter presenting their claims against the estate of the husband after his decease, there may be some question, and the solution of it may depend upon the notice given where the claims were not presented during the first administration. If they were presented, the parties would be bound by a participation and acquiescence in the administration. But a claim for a balance unpaid owing to a deficiency could probably be preserved. Regularly where upon the death of either husband or wife administration is had of the separate property of the deceased, and of the community property, a notice should be given to the separate creditors of the deceased, and also to the creditors of the community, to produce their claims, etc. In case the debts against the community were contracted by the deceased, a notice to his creditors would be sufficient to include such creditors of the community. But this would not be true if such community debts were contracted by the surviving member, at least in the absence of actual notice. For instance, if the community debts had been contracted by the husband, as is usually the case, upon the death of the wife a notice to her creditors would not be notice to the creditors of the community, but upon the death of the husband a notice to his creditors would include the creditors of the community, for they could fairly be said to have had notice, the community debts having been contracted by the husband; and the rule would hold good of course if the parties were changed in cases where the community debts were contracted by the wife.

In this case, upon the death of the wife, her separate

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property was, of course, subject to the probate court for the purposes of settlement and distribution; and the same was true with regard to the whole of the community property of the deceased and her husband George D. Hill.

We are of the opinion, however, that a husband or wife cannot appoint an executor to take charge of the community estate to the exclusion of the surviving spouse, but the survivor would be the only one who could question the same. Such an appointment would be good as against all others. Although in the administration of such estates a separate account should be kept of the community property and of the separate property of the decedent, yet, as a matter of convenience and economy as well, the whole should be in the hands of the same person for the purposes of administration. But this need not be so necessarily as a matter of law, and could not be, at least ordinarily, where the appointment of the executor named by the decedent is not consented to by the surviving husband or wife, or where the survivor does not waive his or her rights in the premises. Where the person named as executor in the will cannot, for the reasons stated, be appointed to take charge of the community estate, an administrator thereof should be appointed, to which appointment the surviving spouse, or the person he or she might nominate, would have preference. Sec. 900, Code Proc. Such administrator would be entitled to the whole of the community estate for the purposes of administration. But the administration of such separate estate of the deceased and of the community property would be one proceeding in the sense that it would only be necessary for creditors to present their claims once.

The deceased died testate, but she appointed her husband executor, and he entered upon the administration of her separate estate, and the whole of the community estate. Upon his death the orderly procedure would have been to

have had a settlement with his representatives, under § 941, Code Proc. Whereupon the separate estate of Ellen K. Hill and the whole of the community estate of said deceased parties should have been turned over to her representatives, as, she having died first, her representatives were entitled to administer the community property. *Lawrence v. Bellingham Bay, etc., R. R. Co.*, 4 Wash. 664 (30 Pac. Rep. 1099.)

In this case the creditors, at least all of the community creditors, would be barred by reason of the notice published, and their failure to object, from raising any question against administering the community property in the settlement of the estate of George D. Hill. Whether the creditors of her separate estate could raise any question thereover, in case her separate property was not sufficient to satisfy their claims, is more difficult to determine, but it is sufficient to say that none of the creditors in this instance are complaining, and the claim of the petitioner rests upon his sole personal right to administer the community property. It seems as though it would be incumbent on her separate creditors to move with diligence after receiving notice, to have the community property administered in the settlement of her estate unless they were satisfied to take the risk of having their claims paid in full out of her separate property, and did not desire to preserve any right against the community estate for any deficiency that might result.

It appears that the representatives of George D. Hill entered upon the administration of his estate in the month of December, 1890, and continued the administration of the community property. No one objected to this, but said proceedings were allowed to go unquestioned for some two years, and until the month of December, 1892, when the petitioner instituted this proceeding to recover possession of the community estate. It does not appear that

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any creditor of the deceased has asked to have the possession of this property turned over, or to have the same administered in the estate of Ellen K. Hill, nor does it appear that any of the heirs or devisees ever made such a request, nor any of the parties interested excepting the petitioner, and we are of the opinion that, whatever personal right he may have had to administer the community estate he has lost by reason of his laches in the premises. It was incumbent on him to have proceeded with diligence to obtain possession of this property; not to sit by and see the same administered in the settlement of the estate of George D. Hill without objection. He was appointed in June, 1891, and for a year and a half slept upon whatever rights he had in the premises.

We are also of the opinion in any event in a case like this the ordinary rules relating to the liability of executors *de son tort* would not apply, even in the absence of a statute upon the subject, although we have one which would have some bearing thereon, § 708, Code Proc. And that such an administration of community property could amount to nothing more than an irregularity, of which advantage must be seasonably taken during the pendency of the proceeding, if at all, and otherwise that the same would be valid as far as the question of the right of the representative of either spouse to administer the same is involved. The liabilities of the estate in either event would, of course, be the same as to claims presented.

It appears in this case that in the administration of the estate of George D. Hill a notice was duly published to creditors; and his creditors, including all the creditors of the community as far as known, have presented their claims, and the time for presenting claims in the settlement of said estate has expired. It would be a hardship upon these creditors who have presented their demands

against the community estate under such circumstances, if the proceedings are to be interrupted and suspended, and the property transferred to another estate for settlement where all of said claims must be again presented, and the proceedings again largely gone through with from the beginning by another officer of the same court.

It seems that George D. Hill published no notice to creditors in administering his wife's estate. The petitioner has done so, however, and the time for presenting claims therein has not yet expired.

No complaint is made that his estate has been mismanaged in its settlement. In fact it is admitted that the executors of George D. Hill's estate are thoroughly skillful and competent, and that they have been and are well and faithfully discharging the trust. We are of the opinion that the petitioner is estopped from setting up any claim of right to administer the community property in question, and the decision of the superior court is reversed, and the cause remanded for further proceedings. There may be some question as to whether the point upon which this case is determined—the question of estoppel—is raised by the appellants in their brief. The facts, however, are stated, although the question of estoppel itself is not therein argued. In some instances the court may take notice of a point not argued, for the purpose of arriving at a just decision upon the merits, although a different rule might be invoked to avoid a harsh decision. This seems to be within the spirit of § 1448, Code Proc., and is one of the purposes which this statute may well serve.

HOYT and ANDERS, JJ., concur.

STILES, J.—I concur in the result reached in the foregoing opinion, but I think many matters have been argued and decided which are not in this case. The rights of

Mar. 1893.] Decision by the Court.

heirs and creditors are not in any way involved in the question which of these two persons shall administer said estate.

DUNBAR, C. J., dissents.

[No. 623. Decided March 1, 1893.]

JOHN A. SILSBY *et al.*, *Appellants*, v. TACOMA, OLYMPIA & GRAY'S HARBOR RAILROAD COMPANY, *Respondent*.

Appeal from Superior Court, Thurston County.

Allen, Ayer & Franklin, for appellants.

Mitchell, Ashton & Chapman, for respondent.

ANDERS, J.—The questions presented in the record in this case are identical with those in the case of *Hatch v. Tacoma, Olympia & Gray's Harbor Railroad Company*, *ante*, p. 1, and, by stipulation of counsel, both causes were heard together, one brief only being filed.

For the reasons stated in the opinion in that case, the judgment of the court below is reversed and the cause remanded, with directions to sustain the demurrer to defendant's special answer.

DUNBAR, C. J., and SCOTT and STILES, JJ., concur.

HOYT, J., dissents.

[No. 680. Decided March 18, 1893.]

W. H. SMITH AND CHARLES SMITH, *by J. W. Frame, Guardian ad litem, Respondents*, v. SEATTLE & MONTANA RAILWAY COMPANY, *Appellant*.

Appeal from Superior Court, Snohomish County.

Burke, Shepard & Woods, for appellant.

Whitney & Frame, for respondents.

Per curiam.—Respondent moves to dismiss this appeal for the reason that it appears from the record that the appeal was taken from an order of the trial court overruling the demurrer to the

6a	295
11	636
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amended complaint filed in the action. It appearing from the record that the appeal is taken from such order, and that no final order or judgment has ever been made in said cause, the case falls within the decision of this court in *Tripp v. Magnus*, 1 Wash. 22 (23 Pac. Rep. 805), and the motion will therefore be sustained and the appeal dismissed.

[No. 705. Decided March 18, 1893.]

FIRST NATIONAL BANK OF MT. VERNON, *Respondent*, v. JOHN MCLEAN, *Defendant*, AND J. B. WILEY, *Appellant*.

Appeal from Superior Court, Skagit County.

Million & Houser, for appellant.

Henry A. McLean, and *Fishback, Elder & Hardin*, for respondent.

Per curiam.—Respondent moves to dismiss the appeal in this case for the reason that no notice of appeal was given according to law, or at all. And it appearing from the record that no notice of appeal, either oral or written, was given to respondent by appellant in this action, the motion must prevail and the appeal be dismissed with costs to respondent.

[No. 718. Decided March 18, 1893.]

WILLIAM R. BENTLY, *Appellant*, v. THE PORT TOWNSEND HOTEL AND IMPROVEMENT CO. *et al.*, *Respondents*.

Appeal from Superior Court, Jefferson County.

James J. Easley (*A. W. Buddress*, of counsel), for appellant.

Parsons & Corell, *Johnson & Moody*, and *George D. Blake*, for respondents.

Per curiam.—Motion is made in this case to dismiss the appeal, and to strike the pretended statement of facts from the record for the reason that it was not filed or settled in time; that it was not certified as required by law; that it does not contain the evidence given on the trial, and that notice of its settlement was not sufficient nor in time to give the court jurisdiction to settle it.

This case falls within the rule laid down by this court in *Stenger v. Roeder*, 3 Wash. 412 (28 Pac. Rep. 748); also *Enos v. Wilcox*, 3

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Wash. 44 (28 Pac. Rep. 364); *Snyder v. Kelso*, 3 Wash. 181 (28 Pac. Rep. 335).

The motion will be sustained, the statement of facts stricken, the appeal dismissed and the judgment of the lower court affirmed.

[No. 811. Decided March 18, 1893.]

BRANDON KIRBY, *Appellant*, v. EMMA N. COLLINS, *Respondent*.

Appeal from Superior Court, Jefferson County.

George W. Tyler, for appellant.

Smith & Felger, for respondent.

Per curiam.—Respondent moves to strike the statement of facts from the files and record herein and to dismiss the appeal, for the reason that the said statement of facts was not properly certified by the trial court. It does not appear from the certificate to the statement of facts in this case that the said statement contains all the material facts in the said cause. On the authority of *Enos v. Wilcox*, 3 Wash. 44 (28 Pac. Rep. 364); *Cadwell v. First National Bank*, 3 Wash. 188 (28 Pac. Rep. 365), and an unbroken line of decisions of this court, the motion will be sustained, the statement stricken and the appeal dismissed.

[No. 880. Decided April 7, 1893.]

L. B. EICHOLTZ, *Respondent*, v. BEN. HOLMES, *Appellant*.

Appeal from Superior Court, Cowlitz County.

Andrew F. Burleigh, and J. E. Lilly, for appellant.

M. E. Billings, and E. W. Ross, for respondent.

DUNBAR, C. J.—The motion in this case must be denied, for outside of the merits of the case (and the facts are so conflicting that the court could not feel justified in presuming against the correctness of the statement of facts), this is not the kind of a case where the remedy is by suggesting a diminution of the record. The motion here is to make another and different record from the one certified by the judge. Under the circumstances of the case, however, we think it but fair that appellant should have the time extended

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Case 1	
35	524

for filing his brief, and he is hereby given thirty days from the date of the filing of this opinion within which to file the same.

STILES, HOYT, ANDERS and SCOTT, JJ., concur.

[No. 894. Decided April 7, 1893.]

LOUISE THOMPSON, *Respondent*, v. J. R. McDONALD, *Appellant*.

Appeal from Superior Court, King County.

Charles Lovejoy, for appellant.

R. Winsor, for respondent.

DUNBAR, C. J.—Respondent brings here a short record, and moves the court to dismiss the appeal and affirm the judgment for the reason that the transcript has not been filed within the time required by law. The affidavit of the appellant utterly fails to show a sufficient reason for not complying with the provisions of law, and the motion will be granted to the extent of dismissing the appeal.

STILES, HOYT, ANDERS and SCOTT, JJ., concur.

REPORTS OF CASES
DECIDED IN
THE SUPREME COURT
OF THE
STATE OF WASHINGTON,
AT THE
MAY SESSION, 1893.

[No. 452. Decided May 8, 1893.]

6	299
13	267

ROBERT L. FOX, *Appellant*, v. WILLIAM A. UTTER, *Respondent*.

SALE—ARTICLES MANUFACTURED TO ORDER—STATUTE OF FRAUDS
—DELIVERY AND ACCEPTANCE—APPEAL—DELAY IN FILING
TRANSCRIPT.

Although a complaint may be based upon a contract of sale which is void within the statute of frauds, yet where the case made by the answer and reply, and tried without objection by the defendant, shows the contract to be one for the manufacture and delivery of an article, the statute of frauds has no application.

In case of the manufacture of specific articles upon order, a tender of the manufactured article is a sufficient delivery, without its acceptance by the purchaser.

If, upon the tender of a manufactured article ordered by the purchaser, defects of construction or departure from the terms of contract are alleged, they must be pointed out within a reasonable time, and the maker given a chance to repair defects, or acceptance will be presumed.

The omission of the clerk to send up the statement of facts with the transcript of the record is not ground for dismissal of the appeal, where the mistake is corrected as soon as discovered.

Appeal from Superior Court, Whatcom County.

Howe & Corson, for appellant.

Fairchild & Rawson, for respondent.

The opinion of the court was delivered by

STILES, J.—This cause was appealed while the act of 1890, prescribing the method of taking appeals to the supreme court, was in force. Therefore, no bond for costs was necessary. Respondent objects that no transcript has been filed in this court. The transcript of the record was filed in January, 1892; but inadvertently the clerk did not send up the statement of facts with it. It was sent immediately after the omission was discovered.

Motion to dismiss denied.

Appellant alleged in his complaint the sale and delivery to the respondent of an Italian marble monument for the agreed price of \$375, in October, 1889. The amended answer denied the sale; but set up affirmatively a contract for the manufacture, delivery and setting up of a monument, in August, 1889, the monument to be of a certain style and size, and to be placed in position in a good and workmanlike manner—all for \$375. And it was further answered that a monument was manufactured and set up, but that it did not conform to the contract in several particulars, and was badly placed in position, so that the respondent refused to accept it, and notified appellant to that effect. The reply admitted the transaction to have been a contract for the manufacture, delivery and setting up, as alleged, and maintained by denials that the contract had been substantially performed. The complaint ought to have been amended; but, under the pleadings as they stood, the cause went to trial, and was tried throughout, until the charge was given to the jury, upon the theory of a contract as set up by the answer. Evidence of the agreement, and of all that he did under it, offered by the appellant, was received without objection, and the respondent met it by counter evidence in the same direction.

But in charging the jury the court deemed the cause of action stated in the complaint to be binding, and therefore

instructed that, in case of a sale of goods of the value of fifty dollars or more, the sale was void unless some part of the price was paid, or there was a memorandum within the statute of frauds, or some part of the goods were received by the purchaser. We think this was error, for the case made, without objection, was upon the contract to manufacture, where a different rule governs, and the statute has no application. *Mead v. Case*, 33 Barb. 202; *Meincke v. Falk*, 55 Wis. 427 (13 N. W. Rep. 545); *Goddard v. Binney*, 115 Mass. 450; *Parsons v. Loucks*, 48 N. Y. 17.

There was a variance, of course, but it was one which both parties disregarded; and the instructions ought, therefore, to have been upon the facts, rather than the letter of the complaint.

The tenth charge, in which it was said that no delivery to respondent could be found unless there was first found to be an acceptance by him, was doubtless given upon the theory of a void sale. In cases of the manufacture of specific articles upon order, a tender of the manufactured articles is sufficient. *Shawhan v. Van Nest*, 25 Ohio St. 490; *Gordon v. Norris*, 49 N. H. 376.

Time must have been made of the essence of the contract to avoid this rule, if the reason for refusal to receive is based on the lateness of delivery. And if upon tender of the article, the purchaser allege defects of construction or departure from the contract he must point them out, and give the maker a chance to remedy the difficulty. This is especially so where a peculiar article has been made according to a design of the purchaser, and will be of less or no value to others. This contract was one for labor, rather than of sale. *Davis v. Downs*, 4 Mich. 530; *Bement v. Smith*, 15 Wend. 493.

In a transaction of this kind, if the monument was set up, and the respondent was informed of that fact, within a reasonable time thereafter, according to his opportunities

to visit the cemetery, he should have examined the work, and notified appellant of his objections; otherwise appellant would be justified in presuming an acceptance and charging him with the agreed price, unless, by waiving the constructive acceptance, and undertaking to repair defects, he should himself leave open the question whether or not his contract had been substantially performed. The latter would seem to be about the fact in this case. Proceeding according to what we consider to be this correct theory of the case, we anticipate no difficulty on the part of the court in arriving at a satisfactory conclusion of it upon a re-trial.

Judgment reversed, and new trial granted with leave to amend the complaint.

DUNBAR, C. J., and HOYT and SCOTT, J.J., concur.

ANDERS, J., not sitting.

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33* 650
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[No. 539. Decided May 8, 1893.]

SEATTLE CROCKERY COMPANY, *Respondent*, v. JOHN
HALEY AND JOHN SCHRAM, *Appellants*.

ATTACHMENT—ACTION ON BOND—LIABILITY OF SURETIES—ESTOPPEL—WRONGFUL ATTACHMENT—REASONABLE CAUSE—DAMAGES.

Where the principal on a bond is a non-resident and has no property in the state liable to attachment, the sureties on the bond cannot require the obligee, by notice in writing, to forthwith institute an action against the principal.

In an action against the sureties upon an attachment bond, the complaint does not state facts sufficient when it alleges the execution of the bond by the principals, without alleging that the sureties joined in its execution, although it may set out a copy thereof in the complaint, to which the names of the sureties are appended. (HOYT, J., dissents.)

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Sureties upon an attachment bond may be liable for damages, without prior demand upon the principal, or suit against him to adjudicate the damages.

The principal and sureties giving bond for the attachment of property of a corporation are thereby estopped to deny its corporate existence.

In order for the sureties upon an attachment bond to avoid liability for actual damages, reasonable cause for the attachment must exist as a fact; credible information of facts sufficient to warrant a belief in the existence of reasonable cause tends merely to disprove malice and thereby relieve from exemplary damages.

In an action upon an attachment bond for damages for wrongful levy the plaintiff may show want of reasonable cause for the levy by proof as to the conduct of his affairs and the good faith of his transactions.

Liability upon a bond for malicious attachment accrues, if the agent whose direct act caused it to be issued was actuated by malicious motives, although without the knowledge of the principal, unless it is shown that the agent had no authority to attach, and that his act in doing so was affirmatively repudiated as soon as known by his principal.

In an action for damages for malicious attachment, injury to commercial credit is not an element of damages.

Appeal from Superior Court, King County.

Burke, Shepard & Woods (*Charles E. Shepard*, of counsel), for appellants.

Blaine & DeVries, for respondent.

The opinion of the court was delivered by

STILES, J.—*Cerf, Schloss & Co.*, of San Francisco, brought suit in the United States circuit court against the respondent for the recovery of certain money, a large part of which was not due. In aid of their suit an attachment was issued, in pursuance of which the marshal seized the entire stock of goods of the respondent, and held them during six days, until the writ was discharged on the ground that it had been improperly issued. This was an action upon the attachment bond against the sureties only,

the principals being non-residents, and not appearing, although they were nominally parties.

1. The first point to be noticed is the action of the court below in striking out two defenses based upon Code Proc., § 756, which provides that a surety may require a creditor or obligee, by notice in writing, to forthwith institute an action upon the contract. As was said above, the principals on the bond were non-residents, and it was not made to appear that they had any property in this state liable to attachment. For these reasons the statute had no application to the case. *Phillips v. Riley*, 27 Mo. 386; *Conklin v. Conklin*, 54 Ind. 289.

2. This was a joint and several statutory bond of indemnity, and the rules in such cases, as to strictness of allegation and proof were in full force. But the complaint did not allege the execution of the bond by the sureties, nor was there any proof addressed to that point. The eighth paragraph of the complaint was as follows:

“8. That at the time of filing said (attachment) affidavit and complaint, to wit, the said 17th day of January, 1891, and in compliance with the statute in such case made and provided, and as a condition upon which the said writ of attachment should issue, the defendants Rudolph Cerf and Benjamin Schloss made, executed and filed in said circuit court a bond for attachment in the words and figures following”—

And the answer admitted the facts stated to be true. A general demurrer, in which the deficiency of the eighth paragraph was pointed out, was overruled, and on the trial the court treated the case as if the fact that the complaint contained a copy of the bond in which Haley and Schram were named as sureties, and to which their names were appended, was sufficient to charge them with the execution of the instrument, and put them to an affirmative denial of that proposition. Citations by counsel for respondent on this point do not sustain him. A late one is *McLellan*

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Drydock Co. v. Farmers' Alliance Steamboat Line, 43 La. An. 258 (9 South. Rep. 630), in which the bond was annexed to the petition, and the prayer asked judgment against the principal and the sureties *in solido*. The appearance was for all of the defendants, and the court said:

"The defect of the petition in not alleging specifically that Marston was indebted is cured by the annexing of the bond which was made part of the petition, and which exhibited his liability, by his answer without exception, and by the administration of proof without objection."

If the case at bar had gone through all its stages to the trial, and evidence of the execution of the bond by the sureties had been received, without objection, a different case would be presented.

In *Pefley v. Johnson*, 30 Neb. 529 (46 N. W. Rep. 710), the complaint alleged that "plaintiff entered into a contract in writing with defendant, a copy of which was attached;" and we find in every case of this kind examined some words of allegation which show execution of the instrument by the party to be charged, upon which the courts, although they do not favor that method of pleading, accept the recitals of the instrument as allegations of fact as far as they go. *Lambert v. Haskell*, 80 Cal. 611 (22 Pac. Rep. 327).

Clement v. Hughes (Ky.), 17 S. W. Rep. 285, was an action upon a guardian's bond, and it was there said:

"It is necessary, in an action upon a writing, to aver such acts and omissions by the defendant as entitled the plaintiff to relief; and this rule is not complied with in an action against a surety, unless the petition avers the execution of the writing by him, and the substance of his agreement."

But in that case, inasmuch as the petition averred that the guardian executed a bond *with the defendants as sureties*, and as the bond was copied into the petition, it was

not necessary to allege further the substance of the contract for what the sureties covenanted to do was supplied by the copy. We understand that the rules of pleading go thus far in favor of exhibits, and no farther.

This holding will necessitate the reversal of the judgment, but there are other matters to be considered, in view of the new trial.

3. Appellants claim that the sureties are not liable in the first instance for the damages, but only after demand on the principal, or suit against him to adjudicate the damages, and non-payment. It is sufficient to say that the statute does not require a bond conditioned that the plaintiff will pay on demand, or will pay any judgment that may be obtained against him. Such courts as have held demand, or a judgment in a distinct action, to be prerequisite to recovery on an attachment bond, have based their rulings on their peculiar statutes. Note to *Burton v. Knapp*, 81 Am. Dec. 468; Drake on Attachments, § 166; 2 Wade on Attachments, § 298.

4. When it has been established that persons have joined in giving a bond for the attachment of property of a corporation they are not in a position to deny its corporate existence; so the alleged errors in proving the corporation in this case were immaterial.

5. The affidavit for the attachment alleged that the Seattle Crockery Company was about to dispose of its property with intent to defraud its creditors, and that it had so disposed of its property, or a portion thereof. A traverse of these allegations was followed by an order to discharge the attachment, upon oral proofs of the parties. No findings were made, but we think, in such a case, it must be taken that the adjudication was final as to the wrongfulness of the attachment. Now, if Code Proc., § 293, stood alone, it would seem that the production of the record here would have entitled the respondent to nominal damages, for, by

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that section, the bond is conditioned that the plaintiff will prosecute his action without delay, will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the attachment should the same be wrongfully, oppressively or maliciously sued out. Nothing is therein said about reasonable cause. But, when we come to § 295, we find that recovery upon the bond depends upon the plaintiff's showing—(1) A wrongful suing out of the attachment *and* that there was no reasonable cause to believe the ground upon which the same was issued to be true, when he may recover actual damages and attorney's fees; (2) a malicious suing out of the writ, when he may recover exemplary damages also.

This looks like a hard statute to comply with, since it involves the proof of a negative, viz., want of reasonable cause. Appellants maintain that the correct course for the respondent was to begin with the assumption that the attachment was wrongful, as appeared from the record of the circuit court, and then to proceed to show that the attaching creditors did not have information worthy of credit of facts justifying a belief in the existence of the grounds alleged in their affidavit; that is, they contend that the reasonable cause meant, is a state of mind produced in the attaching party by information which he believes to be true. But the plain reading of the statute is not that way. It does not depend upon the state of mind of anybody, but upon the true facts of the case. It is for the plaintiff in any such case, if there has been no previous adjudication, to lay before the jury the facts concerning his affairs sufficiently to show that as they were known, or might have been known by reasonable inquiry, there were no fraudulent transactions on his part, and none upon which the ordinary business man would naturally look with suspicion; for if one act suspiciously there may be reasonable cause to justify a belief that a fraud has been, or is about to be,

perpetrated, although no fraud be intended. But the facts and acts must exist; mere tale bearing, although believed in, will not supply their absence. Reasonable or probable cause is a different thing from the information upon which a belief in its existence may be based. To avoid liability upon the bond for actual damages the reasonable cause must exist as a fact; but credible information of facts sufficient to warrant a belief in the existence of reasonable cause will tend to disprove malice and thereby to relieve from exemplary damages.

In this matter we are compelled to take issue with the supreme court of Iowa, which has frequently held that the plaintiff in such a case must not only prove that no cause existed for an attachment, but also that the defendant had no reasonably credible information that such a cause existed. *Burton v. Knapp*, 14 Iowa, 196; *Vorse v. Phillips*, 37 Iowa, 428; *Dent v. Smith*, 53 Iowa, 262 (5 N. W. Rep. 143). The first named case was decided under a statute as to bonds and suits upon them, in substance like the statutes of the most of the states (Stat. Iowa, 1860); and we think the Iowa supreme court stood alone in holding that the actual damages were not recoverable when the attachment was issued without cause existing therefor. *Jerman v. Stewart*, 12 Fed. Rep. 271. The last two cases, however, were decided under a statute precisely like our own (Stat. Iowa, 1888), and the only one which is like it, in the section governing recoveries on the bond. To say that a debtor may be deprived of the use of his property, not for any fault of his own, but because his creditor believes that he has been in fault, is to make his rights depend upon a matter which the law cannot, and does not pretend to, regulate, viz., the nature and condition of the creditor's mind; and is to put him, upon the trial of his suit for damages, to proof of facts which he can get positively from no other source but the creditor himself, which

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would be entirely unreasonable. Moreover, different creditors whose rights to have an attachment are equal when a cause exists, would be placed upon an entirely different footing, if the writ should be discharged for want of actual cause. When one creditor attaches, others are likely to, deeming that the affidavit of the first one on file is sufficient information to lead a prudent person to act; but in a suit for damages the first one would escape, under the Iowa rule, because he had credible information, while the second would pay the full penalty. The language of the statute is: "And that there was no reasonable cause to believe the ground . . . to be true." The "ground" in this case was that respondent had disposed of its property with intent to defraud its creditors, and that it was about to do so; but the "cause" for believing that ground to be true was not the statement of any one that there was a cause, but a fact, or facts, as, for example, a sham sale of crockery to a third person, without consideration, with the understanding that he was to hold it or sell it for the benefit of the respondent, or a plan or scheme devised for that purpose but not yet executed. This cause the law requires the plaintiff to prove to be non-existent.

It was competent, therefore, for the respondent to show — *First*, the discharge of the writ; *secondly*, the want of reasonable cause by proof as to the conduct of its affairs, and the good faith of its transactions; and, *thirdly*, under the allegations of the complaint, the malicious action of the attachment plaintiff. If, at any stage of the case before the cause was submitted to the jury, it abandoned the charge of malice, all evidence upon that subject, and upon the question of exemplary damages should have been withdrawn.

What Mr. Carson stated at the hearing in the circuit court we do not think was admissible. He was the collection clerk for the attorneys of Cerf, Schloss & Co.,

with whom some conversation was had by one of respondent's officers regarding the claim of Cerf, Schloss & Co., and it seems to be admitted that upon that interview, and his report of it to Mr. Shepard, who made the affidavit, depends the question whether Cerf, Schloss & Co. had information of any fact which tended to show them that a fraud was threatened. It was sufficient, therefore, for respondent, after showing that no actual cause existed, to prove the interview with Carson, and stop, for, there being no cause, and, according to its version of the conversation, nothing said, to lead any one to suspect an intention to perpetrate a fraud, it must follow that the attachment was so recklessly obtained that malice could be argued therefrom. From that point it was for the appellants either to dispute the facts in regard to the conversation, or to show that Carson had reported it in such a way as to justify a belief that fraud would be attempted if the claim were pressed, or both; but what Carson reported was only material in case the charge of malice were pressed. Information of such a character from a trusted and confidential employé ought to relieve the principal from the charge of malice when there is no affirmative showing of it, but only a presumption from the fact that the attachment was issued without the existence of reasonable cause therefor.

6. We hold that liability upon the bond for a malicious attachment accrues if the person whose direct act caused it to be issued was actuated by malicious motives, although the principal for whom he acted as agent knew nothing of the transaction, until it is shown that the agent had no authority to attach under any circumstances, and that the act of the agent in attaching was affirmatively repudiated as soon as knowledge of it was received.

7. Some of the evidence in this case was received upon the theory that the respondent might prove damages for loss of business credit, which it alleged it had suffered to

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the extent of \$4,000. And in its charge to the jury the court, after stating to them that all question of malice was withdrawn from their consideration, instructed as follows upon the subject of damages for wrongful issuance of an attachment without reasonable cause:

“1. The court further instructs the jury that if they find for the plaintiff, that in the assessment of actual damages they can consider what, if anything, the plaintiff has suffered in its credit as a merchant.”

2. A substantial repetition of the foregoing, with limitations taken, as is said, largely from the charge in *Kennedy v. Meacham*, 18 Fed. Rep. 312.

“3. The only damages recoverable in this action are the actual damages caused by the attachment, and such damages only include the current expenses of the business during the detention of the store and stock, and the loss of actual net profits, if any, during that time, besides reasonable attorney's fees, to be fixed by the court upon the proper evidence. Actual damages do not include prospective profits of the business, because they are inevitably uncertain and speculative in their nature, and depend on so many remote chances of trade and of subsequent causes.”

The third charge was inconsistent with the first two, for it entirely withdrew from the jury the matter of damages to credit. But if that effect was intended by the court it was of no avail, since the jury brought in a verdict of \$4,000, more than three-fourths of which must have been allowed for injury to the respondent's credit as a merchant. We conclude that it was not the intention to take this element of credit away from the jury, however, because of the court's refusal to grant a new trial.

Respondent strenuously maintains that injury to the credit of a merchant ought to be allowed in these cases, and some authorities are cited in support of the proposition. *Kennedy v. Meacham*, *supra*, is the most outspoken, and

follows precedents set in Alabama. *Donnell v. Jones*, 13 Ala. 490.

In *Meyer v. Fagan* (Neb.), 51 N. W. Rep. 753, a recovery for loss of credit seems to have been allowed to stand; but the question before the supreme court of Nebraska seems to have been only whether the sum recovered was excessive. No discussion of the subject of damages to credit is in the case. About the same state of things is found in *MacVeagh v. Bailey*, 29 Ill. App. 606.

In vol. 7, Lawson's Rights, Remedies, etc., § 3549, the effect of the attachment upon credit is said to be a proper matter for consideration in assessing damages, the only authority cited being *Kennedy v. Meacham*; but in § 3551 the contrary doctrine is laid down and numerous cases are cited.

The general doctrine of the law is that remote, speculative and uncertain damages cannot be recovered for; and injury to credit must necessarily be of the most uncertain value, even when its ascertainment is guarded by the most careful instructions a court can possibly give. What mercantile character and credit are, is clearly defined in *Donnell v. Jones*, *supra*:

“By character, in this connection,” says the court, “we mean the generally received opinion in the community respecting the solvency of the firm—the probity and punctuality with which it discharged its obligations, and the efficiency with which its affairs are managed. Credit, which is usually the result of those qualities and capacities we have named, may be defined, the ability to borrow money or obtain goods in virtue of the opinion conceived by the lender, or seller, that the party will repay.”

While the issuance of an attachment may do injury to this mercantile character and credit of a debtor, it is, in that respect, not different from other judicial proceedings. If the allegations of the affidavit are in the one case libel-

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ous, and tend to break down the confidence theretofore reposed in the defendant, they are no more so than would be a complaint in a suit for money obtained by alleged false pretenses. And so this kind of injury may be brought about as effectually where no property at all has been taken under the writ. The commencement of an ordinary suit upon a promissory note has fully as great a tendency to impair credit as any other proceeding, for the presumption is that a business man will take care of his notes at least, if he has any regard for his standing in the commercial world; and, if he cannot take care of them so that he has to be sued, the inference most naturally is that he is weak in resources, and, therefore, not a safe person to credit. But the note may be forged, or not due, or paid, or there may be counterclaims or good defenses so that the suit is totally unjustifiable. But does any one sue for damages to credit growing out of such proceedings? Not at all, because they are privileged, being proceedings in courts of justice. And so we think this attachment proceeding, and all allegations of fraud made therein, although they may injure the character, reputation or credit of the defendant, are in the same way privileged, and not to be recovered for. All actual damages for the physical taking of property must be compensated under the statute; and when the proceeding is instituted maliciously, exemplary damages can be allowed, at the reasonable discretion of the jury under the evidence. This court in *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45 (25 Pac. Rep. 1072), did not undertake to say that, where the statute expressly provided for them, punitive damages could not be recovered. In such cases, the rules laid down in those jurisdictions where the doctrine of punitive damages is accepted should guide the courts and juries of this state. The actual damages in this case, under the pleadings, consisted—(1) Of the costs and expenses of the motion to

discharge the attachment, including the attorney's fee paid or agreed to be paid therefor, if the same was a reasonable fee; but if a gross fee was paid or promised for the whole case in the circuit court the fee for the motion must be apportioned out of that; and the fee allowed must be no more than a reasonable fee in any event, to be determined by the court without the intervention of the jury. (2) The ascertainable profits of the business while the property was in the possession of the marshal, under a liberal construction of the evidence. (3) Rent and clerk hire during the same time. (4) Actual depreciation of the value of the goods by reason of the marshal's possession and treatment of them, not including, however, any fanciful notion of depreciation because of their having been a "bankrupt stock." (5) A reasonable attorney's fee to be fixed by the court for the prosecution of this action for damages, not including the trial already had or the appeal.

We have passed upon this case, not knowing whether the question of malice would be in it upon a re-trial or not; and the objections and exceptions to rulings upon evidence and instructions were so numerous and complicated that it was impracticable to review them singly. We believe what has been said will serve to indicate how this court regards the several matters before it.

The judgment is reversed, and a new trial granted; the respondent having leave to amend its complaint.

DUNBAR, C. J., ANDERS and SCOTT, JJ., concur.

HOYT, J. (*concurring*).—I think that the complaint, when fairly construed, alleged the execution of the bond by the sureties as well as the principal. As to the other questions discussed, and in the disposition of the case, I concur.

[No. 732. Decided May 8, 1893.]

M. C. SOULE, *Respondent*, v. THE CITY OF SEATTLE,
Appellant.

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—PAYMENT
OUT OF SPECIAL FUND—LIABILITY OF CITY—INTEREST.

Where, under authority of its charter, an ordinance of the city provides that certain classes of street improvements shall be paid for by special assessment against the property fronting thereon, such provisions become a part of the contract, and the persons contracting to make such improvements must look to payment from a special fund; and the remedy of the contractor remains the same although the charter provisions under which the improvement was made have been superseded.

Where a city has already reached its constitutional limit of indebtedness, it has no power to render itself liable for the cost of street improvements contracted for subsequent thereto, even although the city fails to levy an assessment and provide a special fund for such improvement, as it is required by ordinance to do.

Where city officials have issued warrants upon a special fund which was to be collected from property benefited by the construction of street improvements, the city is not liable for interest thereon, until the delinquency of the assessments made for such improvements.

Appeal from Superior Court, King County.

George Donworth, and James B. Howe, for appellant.

Blaine & De Vries, for respondent.

The opinion of the court was delivered by

STILES, J.—After the decision of this court in *Wilson v. Seattle*, 2 Wash. 543 (27 Pac. Rep. 474), respondent, as assignee of the contractor for the work on South Twelfth street, brought a suit against the city, setting out the facts showing the issuance to his assignor of a large number of city warrants as partial payment of his claim for the work done in grading, sidewalking and guttering the street, their

6	315
111	44
33*	384
33*	1080
39*	266

6	315
12	460
13	238
14	301

6	315
15	192
16	456
17	317
17	322

6	315
19	409

6	815
25	212

non-payment, and the failure of the city to provide any fund for their payment by means of a special assessment. The complaint was addressed to the equity side of the court, and prayed judgment for the face of the warrants and interest, and for further relief in equity. The judgment was for the full amount claimed, and for a warrant to be issued by said city of Seattle as provided by law.

The city appealing makes numerous objections, the most important of which are summed up in the proposition that it could in no such event as has here transpired, under the law, be held liable for the cost of work done in grading South Twelfth street. It is maintained that § 7 of the charter of 1886 referred only to repairs of streets, while § 8 provided for new grading; that § 8 expressed the only power the city had to grade, and, as the means therein mentioned for paying the cost were local assessments, there was no other source to which a contractor could look; that the city was the mere agent of the property holders, and that only to the extent of furnishing officers to levy and collect assessments; and that no liability could in any event attach to the city at large, or, at least, not until there was a positive refusal to make an assessment, or such delay or other circumstance as would lose to the contractor his compensation for his work and materials.

There are cases which go to the extent of holding that, where there was either lack of statutory power, or a failure to acquire jurisdiction of the subject matter, a municipal corporation must be entirely absolved from paying such claims. *Hunt v. City of Utica*, 18 N. Y. 442; *Swift v. City of Williamsburgh*, 24 Barb. 427; *City of Leavenworth v. Rankin*, 2 Kan. 357; *Goodrich v. City of Detroit*, 12 Mich. 279; *Johnson v. Indianapolis*, 16 Ind. 227; *Bond v. Mayor. etc., of Newark*, 19 N. J. Eq. 376.

But it is beyond all question, it seems to us, that the city in this instance was not limited to special assessments as a

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means of improving its streets in any way it saw fit. Section 7, by its terms, covered every imaginable improvement, and for such purposes it could borrow money under the provisions of § 24. The authority of § 8 was merely permissive, and was probably expressed solely for the reason that, unless expressed, it could have no existence. The charter of the city of Memphis contained the substance of all there was in these two sections—7 and 8—and in reference to it, the United States supreme court said:

“General power and authority over the subject is by law given the city, and the power also vested in the city to require that the cost may be assessed upon the adjoining owner, does not impair the power of the city itself to do the work. . . . The city may require the owner to pay, but it is not compelled to do so.” *City of Memphis v. Brown*, 20 Wall. 289–310.

To the same effect is *Hitchcock v. Galveston*, 96 U. S. 341. In *Portland, etc., Mfg. Co. v. East Portland*, 18 Or. 21 (22 Pac. Rep. 536), the statute construed would seem to read almost in the form in which appellant contends that this one should be construed; but the agreed price for the material used in the improvement of the street was held to be recoverable, where warrants had been issued payable out of a fund to be collected from assessments, but the fund had not been provided. The concurring opinion of LORD, J., is devoted to a clear showing of the distinction between the general power to improve streets and the special power to do so by local assessments. The able dissenting opinion of THAYER, J., is based entirely upon the fact that in his view the only power expressed was to improve by local assessments.

But it would not be profitable to pursue this matter further, since in the case before us there are other elements in it which are decisive.

Section 8 of the charter contained little in addition to

the conference of power to levy special assessments; but § 10 gave the city authority, by ordinance, to prescribe the method of assessing and collecting such taxes; and the city, availing itself of its alternative authority in the premises, by ordinance 737, adopted in 1886, elected to make all of certain classes of street improvements by the method of special assessments, and regulated the proceedings for levying and collecting the same. Section 2 of that ordinance reads as follows:

“Whenever the common council of the city of Seattle shall cause any part of any street, highway or alley therein to be curbed, paved, graded, macadamized or guttered, or any sidewalk to be constructed in any such street, highway or alley, the whole cost of such improvement shall be levied and become a lien upon the taxable real estate fronting on the part of such street, highway or alley so improved and within the assessment district to be established as hereinafter provided.”

The eighth section provided that when an assessment had been ordered paid to a contractor, a duplicate of the roll should be delivered to him, so that he might collect or foreclose in accordance with the statute. This ordinance became a general law of the city, and was fair notice to all persons dealing with it in such matters, that contracts for street grading and sidewalks would be paid out of special assessments, and not from the street fund or general fund.

Again, at the time this improvement was ordered and the contract made, the constitutional restrictions upon municipal indebtedness were in force, and it appears in the case that although the city of Seattle was limited to one and one-half per cent. on about sixteen millions, she already had out her obligations for upwards of four hundred thousand dollars, an amount far beyond her lawful indebtedness. This condition of things any one contracting with her was bound to know; so, if ordinance 737 was not fully

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explicit in limiting the recourse of the respondent's assignor to the special assessment to be levied upon South Twelfth street property, he must be taken to have been aware that at the date of his contract the power of the city to agree, either expressly or impliedly, or by way of original liability, or as guarantor, to pay him any sum was completely gone, unless, perhaps, by express assignment of current revenue.

But the respondent endeavors to avoid this turn of affairs by two arguments: (1) That he has a right to recover damages for the failure to levy the assessment and procure the fund. (2) That he had no remedy whatever when he brought his suit.

On the first point we are not with him. This is not an action against officers for the neglect of a duty whereby irreparable loss has occurred. If he could recover at all, it must be upon the contract of his assignor, or upon his warrants. The contract called for payment "out of a special fund created for that purpose;" and the warrants directed the treasurer to pay them "out of South Twelfth street improvement funds, under ordinance No. 1413, not otherwise appropriated." No other considerations intervening, if the fund failed, the *implied* agreement would be to pay absolutely. It is true that the debt limits imposed upon municipal corporations are held not to apply where one suffers a wrong at their hands which is *ex delictu*; but, whatever might be held to be the character of this action, it is not based upon a tort, but upon a voluntary delinquency. Plainly, if such cases as this were to be allowed to fall within the principles governing accidents due to the bad condition of streets, there might as well be an end to all restrictive legislation upon the power of cities to incur debt. Constitutions and acts of the legislature would be of as little preventive force as cobwebs in a cyclone.

Concerning the remedy. Having contracted with Smart, the statute and ordinance 737 became a part of the contract, which neither the state nor the city could alter in any substantial particular so as to jeopardize the payment of the contract price of the work. There must be an assessment of this property to pay for this work, and if the law which was a part of this contract had been entirely swept away and no other substantial provision made, the courts would still be bound to interfere, even to the extent of themselves making and enforcing the assessment if there were no proper officers of the city to perform that work. But the new city charter of 1890, which went into operation pending the performance of this contract, put no obstacles whatever in the way of making such an assessment. A change was made in the method of assessment, viz., from valuation to frontage, and the city now pays for street intersections; the former was an immaterial change in the remedy so far as the contractor was concerned, but the latter was of interest to him inasmuch as he might have to rely upon a fund which was already overdrawn. He was entitled to have the assessment for the whole cost of the work spread over the same property that was liable for it under the law governing his contract.

The record shows that after the case of *Wilson v. Seattle* was decided, no steps were taken looking toward a new assessment; but an amendment to the charter, providing for new assessments in such cases, was made March 8, 1892, after the commencement of this action. An act of the legislature approved March 9, 1893, confirmed this amendment and provided a concurrent remedy in such cases; this act went into effect immediately.

The delay in making a new assessment for this improvement is shown to have been due to the doubt which the officials of the city of Seattle had as to the legality of such

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a proceeding, even after the adoption of the charter amendment, without special authority from the legislature. But where, as in this case, the jurisdiction of the corporation to order and contract for the improvement is unquestioned, and where that jurisdiction was regularly exercised, and the work was done, we can discover no valid reason for holding that the power of the city to levy and collect the assessment was exhausted by the abortive effort which resulted in the *Wilson* case. The charter of 1886 being permissive, and having left the regulation of all details to the council, none of the provisions of ordinance 737 prescribing the time within which the several steps for the assessment must be taken could be said to be mandatory, unless it be the single one of notice to property owners. But the entire proceedings looking to the assessment having been held void for want of the notice, the record of an assessment was cleared, and no person could object if new proceedings were instituted and regularly pursued. This would not be a re-assessment of property once legally charged, as sometimes occurs to make up a deficiency, but a new proceeding from the beginning, such as has been sustained by authority. *Pond v. Negus*, 3 Mass. 230; *Hines v. City of Leavenworth*, 3 Kan. 186; *Himmelmänn v. Cofran*, 36 Cal. 411.

We agree with the last named case in holding that it was the right of the contractor to have a valid assessment laid upon the property benefited, and this was a right which could not be taken away by a change in the law amounting to a deprivation of the right to be paid, or by any neglect or failure of the officers of the city. It seems, however, that the course of the city in this case has not been one of neglect, except in the matter of the notice in the first instance. After the decision in the *Wilson* case the delay arose entirely from honest doubt as to the law of the case, in which the respondent seems to have shared, inasmuch as he never

moved to have a new assessment made. Under these circumstances we do not think the respondent was entitled to the judgment awarded him; but in so concluding we desire to have it understood that the controlling reasons of this decision are the peculiar provisions of the charter of 1886, which left it to the city to regulate special assessments, the terms of the contract with Smart, and the fact that in June, 1890, the city of Seattle was prohibited from making an open contract for such street work, by reason of the debt limit of one and one-half per cent., which it had largely exceeded. We leave it an entirely open question whether municipalities may not, under different circumstances, make themselves liable by omissions of the character presented here.

Whether the action of the mayor, clerk and comptroller in issuing warrants to Smart, the contractor, in advance of the collection of the assessment was regular or not, we are unable to say, as the ordinances of the city on this subject are not in the record. But, however that may be, they are not entitled to even that amount of consideration which attaches to the general warrant of such a corporation upon its treasury. The contract in this case, as has been said, called for payment out of a special fund to be created, but no time was stated; and a subsequent clause provided that "warrants" should be issued to Smart, at the first regular meeting of the common council in each month from July to December, inclusive, for seventy-five per cent. of the contract price of work completed during the preceding month, and for the balance at the first meeting of the council after the completion of the work and its approval by the city surveyor. The warrants before us were issued in the last four months, and respondent claimed and was allowed interest at ten per cent. upon each of them from the date of its presentation to the treasurer within a few days of its issue. Obviously this was an error, even though the city

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were fully responsible, for when the contract was made it must have been understood that payment was not due until the special fund could be realized upon, and this might require not only the time limited by ordinance 737 for a collection by voluntary payment, which ran to about March 8, 1891, but also the time necessary for the foreclosure of the assessments where payment was not made voluntarily. Such portions of the assessments as might be collected from time to time the contractor was entitled to immediately; but no assessment of the tax could be made under this ordinance until the work was completed; and this the contractor must have had in mind when he made his bid. These "warrants," therefore, must be regarded as mere partial certificates without negotiable quality, showing the right of the holder to participate in the fund to which they refer when it is realized. We speak of the "holder," because the form in which they were put, the contract and the course of business seemed to contemplate that they were to pass by assignment. *Dorian v. City of Shreveport*, 28 Fed. Rep. 287; *Mayor v. Ray*, 19 Wall. 468.

Equity would say, we think, that interest should be paid upon these warrants from the date when the city would itself have been entitled to collect interest, that is, after delinquency upon the assessment March 8, 1891, but not earlier. Certainly no obligation could be laid upon the city to pay interest before that time, for until then it was in no wise in default, in any view which could be taken of the case.

Judgment reversed, and remanded for dismissal of the cause.

SCOTT and ANDERS, JJ., concur.

HORT, J.—I concur in the result, but not in what is said as to the right of the city to elect whether it will improve

its streets by a general tax or by local assessments, as to which question I express no opinion.

DUNBAR, C. J. (*dissenting*).—I dissent. The judgment, in my opinion, on every principle of fair dealing, is right, and should be affirmed.

ON PETITION FOR RE-HEARING.

STILES, J.—Counsel for respondent in this case urges, upon a petition for re-hearing, that this court erred in assuming as a fact in its opinion heretofore filed, that at the time of making the contract for the grading of South Twelfth street the city of Seattle had reached its constitutional limit of indebtedness. The facts are these: The answer of the city set up the fact that the constitutional limit had been reached as one of its defenses, and to this defense the plaintiff interposed a demurrer, which was sustained by the court; but upon the trial, notwithstanding this defense had been shut out, counsel for the city offered to prove the fact. Errors were assigned upon the action of the court in sustaining the demurrer, and in shutting out the proof.

In disposing of the case on appeal, this court found the action of the court below to be error, and had that fact been the only point in the case it would have gone back for re-trial. But the main point upon which the case was decided was that the respondent had mistaken his remedy, by reason of the fact that his contract with the city was of such a character that it would not justify the charge of negligence against the city until it had been fully moved to levy and collect a local assessment to pay for the work. This ground alone, in our judgment, authorized the dismissal of the case. The other matters discussed were in the case, but were not absolutely necessary to its decision upon the merits. It cannot be questioned that, in argument, we were justified in assuming the fact of the city's

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having reached its debt limit to be true, since the demurrer of the plaintiff to the answer on that subject was an admission of the truth of the fact as alleged. We are entirely satisfied with the disposal of the other points.

The petition for re-hearing is denied.

HOYT, SCOTT and ANDERS, JJ., concur.

[No. 770. Decided May 8, 1893.]

SEATTLE OPERATING COMPANY, *Appellant*, v. J. J. CAVANAUGH, HATTIE CAVANAUGH AND NICHOLAS KRIER, *Respondents*.

LANDLORD AND TENANT—UNLAWFUL DETAINER—SUFFICIENCY OF EVIDENCE.

The verdict of the jury for defendant in an action of unlawful detainer will not be disturbed, where the relation of landlord and tenant is not clearly established by the evidence. (HOYT, J., dissents).

Appeal from Superior Court, King County.

Andrew F. Burleigh, for appellant.

Ronald & Piles, for respondents.

The opinion of the court was delivered by

STILES, J.—The appellant, a corporation, brought an action of unlawful detainer under the act of March 27, 1890, to recover rent for, and possession of, a tract of land in the city of Seattle upon the tide flats in front of that city. The premises in controversy, up to the time of the fire in 1889, had been occupied and used by the Columbia & Puget Sound Railroad Company, a corporation, which had theretofore wharfed over a portion of the tide flats which was occupied by its tracks, and other portions were used by it in connection with a saw mill, for the storage of

logs, making up of rafts, and unloading of scows, etc. After the fire the railroad company agreed with one Galligher to lease to him, or some one to be designated by him, a portion of the tide flat area claimed by it according to boundaries thereafter to be surveyed and established. The lease was to run for a term of years from a time to begin in the future. Before this lease was made, however, Galligher leased a portion, viz., that which is herein sued for, to the respondent J. J. Cavanaugh and another, who took possession and built a house on the premises. This lease to Cavanaugh was executed about December 11, 1889, and the lessees paid rent to Galligher until about November 30, 1890, from which time they refused to pay any rent.

The facts thus far would seem to bring the case within that of *Hall & Paulson Furniture Co. v. Wilbur*, 4 Wash. 644 (30 Pac. Rep. 665), were Galligher the plaintiff. But on January 1, 1890, the railroad company, at the request of Galligher, executed and delivered to the appellant a lease in writing for the term of five years; and, in October following, appellant sought to have the respondents Cavanaugh and wife accept from it a new lease. Negotiations begun to that effect in September or October, 1890, were continued for some time, and resulted in the execution of a lease by the operating company, and, as it is maintained by it, the acceptance of the lease by the Cavanaughs. Mrs. Cavanaugh was then in Texas. The lease was in duplicate, and was executed by her husband before it was sent to her. She executed it in Texas, and it was then returned by her to E. P. Edsen, esq., who was the attorney for herself and her husband in the transaction. Edsen did not deliver it to either party, but retained it in his possession. There were other facts which made it proper and necessary that the question whether the execution of this lease was ever consummated should be left to the jury. In view of the

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Syllabus.

fact that this was an action of unlawful detainer, it was necessary that the conventional relation of landlord and tenant should be clearly established between the parties before the jury could be able to say that the defendants were guilty. The instructions of the court in this particular are not complained of, and, the question having been fairly submitted to the jury upon that point, we are not disposed to disturb the finding.

Judgment is, therefore, affirmed.

DUNBAR, C. J., and SCOTT, J., concur.

ANDERS, J., not sitting.

HOYT, J. (*dissenting*).—I am unable to agree in the affirmance of the judgment in this case. If the lease made by the appellant was inoperative for want of delivery or acceptance by the respondents, the one made by Galligher still remained in force, and the appellant under all the circumstances of the case should be held to be the owner thereof, and entitled to enforce its terms as against the respondents, and as the proof showed a violation of the terms thereof a cause of action was established in favor of the appellant, and it should have had judgment in its favor.

[No. 577. Decided May 9, 1893.]

ANNA CARTER, *Respondent*, v. E. D. DAVIS, *Appellant*.

EXEMPTIONS—ABSCONDING HOUSEHOLDER.

Where a person has left the state with intent to defraud his creditors his property is not exempt from attachment, and his wife cannot claim the statutory exemption in his behalf.

Appeal from Superior Court, Skagit County.

Million & Houser, for appellant.

The opinion of the court was delivered by

ANDERS, J.— This action was brought by the respondent to recover certain property in the possession of the appellant, who, as sheriff of Skagit county, levied upon and took the same into his custody by virtue of certain writs of attachment issued out of the superior court of said county in certain actions therein pending against one R. P. Carter, the husband of the respondent; and also to recover certain moneys, being the proceeds of attached property sold by the appellant by order of court. That the writs, by virtue of which the property was seized, were regular and valid upon their face was not disputed. Nor did the respondent claim to be the owner of the property attached, except a portion thereof, in her own right. But she based her right of recovery upon the alleged ground that the property was, by law, exempt from execution or attachment, and that the appellant was therefore wrongfully in possession of it. The testimony is not in the record, but the facts, as found by the court, were agreed upon between the respective parties, except as to the ownership of certain property claimed to be the separate property of the respondent, which question was submitted to a jury upon special interrogatories, and determined in favor of the respondent. Upon the facts so found and agreed upon, the court rendered judgment in favor of the respondent and against the appellant for the possession of the property in controversy and for costs. The appellant contends that this judgment is unsupported by the findings of fact and is contrary to law.

The findings of fact, which are not altogether as full, explicit and consistent as they might have been made, show that the respondent and R. P. Carter are husband and wife, have no children, and are engaged in the business of farming; that on December 1, 1891, the appellant, acting

May, 1893.] Opinion of the Court—ANDERS, J.

under the direction of certain writs of attachment against the property of the said R. P. Carter, levied upon and took into his possession certain described live stock, consisting of horses, mules and neat cattle, together with other property in controversy; that on January 4, 1892, the appellant, by order of court, sold a portion of the property so levied upon, to wit, two horses named "Big Nellie" and "Fannie," for which he received the sum of one hundred and sixty-five dollars, and also all the balance of the live stock above mentioned (except one cow, and two calves, which were claimed and received by the respondent at the time of the sale), for which he received more than two hundred and fifty dollars; that fifty days prior to said sale, the said R. P. Carter absconded and left the State of Washington, with intent to defraud his creditors; that afterwards, and on January 19, 1892, the respondent "acting for the said R. P. Carter and in his absence," duly and legally claimed of the appellant as exempt from attachment and sale, and as being community property of the respondent and the said R. P. Carter, certain household goods and furniture not now involved in this litigation, and not exceeding one hundred and fifty dollars in value; also two hundred and fifty dollars in coin, the proceeds of the sale of live stock, selected in lieu of the exemptions provided for in subdivision 4 of § 486 of the Code of Civil Procedure, and also the sum of one hundred and sixty-five dollars, the proceeds derived from the sale of the horses "Big Nellie" and "Fannie" as aforesaid, together with other property claimed to be her separate property and not subject to attachment and sale, and then in the possession of appellant.

From the above statement of the facts as presented in the record, it will be observed that it does not appear that the respondent was a householder residing in this state at the time of the levy of the attachment, and, as such, en-

titled to the benefits of the exemption law. Nor does it appear that she intends to carry on the business of farming in the absence of her husband. But it does appear that, in claiming the property in question as exempt, she was acting for R. P. Carter in his absence. Now, conceding that R. P. Carter was a householder at the time of the levy, and it appearing that his family consisted of his wife, the respondent, only, he had a right as such householder, if entitled to any exemption whatever, to retain one bed and bedding, and other household goods and utensils and furniture, such as he might select, but not exceeding five hundred dollars coin in value. Code Proc., § 486, subd. 3. The respondent, as his representative, selected the "bed and bedding" and certain other household goods, utensils and furniture not exceeding one hundred and fifty dollars in value, none of which was levied upon by the appellant, and then demanded of appellant, in lieu of other property of like character which was not selected, and perhaps not even possessed by her husband, two hundred and fifty dollars, the proceeds of the sale of the live stock above mentioned, none of which was claimed to be exempt at all, and also the sum of one hundred and sixty-five dollars, the proceeds derived from the sale of the two horses, "Big Nellie" and "Fannie." The claim to this two hundred and fifty dollars, in the hands of the sheriff, is manifestly unfounded in law. The section of the statute referred to authorizes the selection of "other household goods, utensils and furniture," and prescribes the method and by whom such property may be selected, but confers no right to retain or select other property of a different character, in lieu of that authorized to be selected and retained.

But it is claimed by the appellant that in no event can the judgment in this action be sustained, for the reason that the legislature has expressly provided that the property of a person who has left the state with intent to de-

May, 1893.] Opinion of the Court—ANDERS, J.

fraud his creditors shall not be exempt from execution or attachment. Code Proc., § 489. Such being the law, the judgment must be reversed, irrespective of other considerations, unless the respondent has shown that she has some right or interest in the property claimed on behalf of her husband, beyond that which could be asserted by him. And we are unable to perceive that she has done so. The husband himself could only claim the property in controversy as a householder and a farmer, but having absconded he lost all right of exemption in either capacity. And what the husband could not do the respondent could not do for him, as his agent or representative. His rights can in no way be enlarged by the mere fact that the statute permits his wife to select as exempt in his absence such property as he might select if personally present.

But the court finds as a fact that a certain portion of the property in dispute is the separate property of the respondent, and that finding, for the purposes of this case, must be taken as true. Our conclusion, therefore, is, without discussing the remaining questions raised by the appellant, that the judgment of the court below must be reversed, except that portion thereof referring to the specific separate property of the respondent, as to which it must be affirmed.

The cause is accordingly remanded to the lower court, with directions to modify the judgment heretofore entered and to enter judgment for the respondent for the possession of the property described in paragraph 5 of the findings of fact herein. The appellant will recover costs.

STILES, HOYT and SCOTT, JJ., concur.

DUNBAR, C. J., dissents.

[No. 750. Decided May 9, 1893.]

COLUMBIA & PUGET SOUND RAILROAD COMPANY, *Appellant*,
v. THE CITY OF SEATTLE, *Respondent*.

MUNICIPAL CORPORATIONS—STREETS OVER TIDE LANDS.

Under the constitution and laws of this state cities of the first class have, as against private parties, the absolute right to extend their streets over and across the tide lands lying within their corporate limits, subject only to the rights of navigation in the waters covering such tide lands.

Where a city, by an ordinance regularly passed, recognizes the existence of a street over a certain portion of tide land, and provides for the widening and extension thereof, and the city, by its proceedings, is estopped to deny that such location is a street, such location must be held to be a street as to the public generally, and no private person can question the city's right to establish it.

(STILES and ANDERS, JJ., dissent.)

Appeal from Superior Court, King County.

Andrew F. Burleigh, for appellant.

George Donworth, and *James B. Howe*, for respondent.

The opinion of the court was delivered by

HOYT, J.—The only question involved in this case is as to whether or not a certain part of the tide lands within the corporate limits of the city of Seattle is a public street of said city. If it is, the judgment of the court below must be affirmed, and if it is not, it must be reversed.

Respondent relies upon each of several grounds as being effectual to constitute it a street, but in view of a division of the court upon some of the questions thus presented, but a single one will be stated here, that alone, in the opinion of the majority of the court, being sufficient to determine the controversy between the parties.

By the constitution and laws of the state, cities of the first class are given the right to project or extend their

6	332
7	156
33*	894
34*	795
34*	553
6	332
11	232
33*	821
36*	686
6	332
12	497
6	332
17	658

May, 1898.]

Opinion of the Court—HORT, J.

streets over and across any tide lands within their corporate limits, and along or across the harbor areas of such cities. The provision of the constitution is not as comprehensive as this; it only empowers such corporations to extend their streets to and across the harbor area. But this provision, interpreted and supplemented in the light of the action of the legislature as above stated, in our opinion, confers full power upon such cities to extend any of their streets over any of the tide lands within their corporate limits. The legislation above referred to was enacted at the same session of the legislature which enacted the law which recognizes in an occupier, improver or shore land owner any right in such tide lands. It follows that the acts must be interpreted together, and in the light of the constitutional provision as to the right of cities to extend their streets over tide lands. And construing all these provisions together it seems to us that the rights conferred upon such cities by such constitutional provision and such legislation must be held to be paramount to those of private parties. From this it follows that the city had the absolute right to extend any of its streets over the tide lands, subject only to the superior right of the use of the waters for purposes of navigation.

Such being the case, the only question left for us to decide is as to whether or not the city has in fact extended Second street over the location in controversy. In our opinion the proof shows that it has. It appears therefrom that an ordinance was regularly passed which clearly recognized the existence of a street over a portion of the location, and provided for its widening and extension as such street. Enough was done by this ordinance and under it to estop the city from setting up the fact that the location in question was not a street. It, therefore, became a street as to the city and the public generally. And as, under the legislation, no private person had any inter-

est which would authorize him to question the right of the city to establish such street, it must be held that by such action on the part of the city the location became a part of Second street.

We do not now decide as to the right of the city to lay out upon the tide lands a street which is not a direct extension of an existing street on the upland. But we do decide that, under the constitutional provision and the act of the legislature above referred to, a city can extend any of its streets in a direct course across the tide lands, and that when it has done so no private person can prevent its taking possession of and improving the same.

DUNBAR, C. J., and SCOTT, J., concur.

STILES, J. (*dissenting*).—The foregoing opinion does not make any reference to what I consider the most vital point in the case, and the point which ought to cause a reversal. All other questions aside, the appellant showed that it had been in possession of these tide lands for many years with its railroad tracks and machine shops, all of which it had constructed on piles. The premises constituted a railroad wharf, and the respondent, without any regard to the appellant's improvements, and to the destruction of some of them, was proposing to open a street when this injunction suit was brought.

Whatever may be said as to the proper construction of art. 15, § 3 of the constitution, authorizing cities to extend streets to the "harbor areas," I am satisfied that the legislature, by the act of 1890, authorizing cities to project or extend their streets over tide lands, did not for one moment contemplate that the rights of "improvers" of tide lands should be taken away in the opening of streets, without compensation to the owners. The general legislation in the state contradicts any such proposition. The act of the same year concerning school lands carefully protected

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Dissenting Opinion—STILES, J.

every improver of them, so that he could not be disposed until his improvements were paid for, even though he were a mere squatter (*Wilkes v. Hunt*, 4 Wash. 100, 29 Pac. Rep. 830); and so, in dealing with tide lands, while the same liberality was not manifested, by requiring purchasers of these lands to pay for improvements which they had not themselves placed there, the right of preëmption was given to improvers, which was not given to settlers on school lands. In degree, the liberality was equal. But this decision practically holds that improvers of tide lands have no rights when their improvements happen to lie in the course of a street extension.

The act of February 28, 1890 (Laws, p. 733), declaring all streets in incorporated cities which extended from high tide into the navigable waters, public highways, only applied to improved ways, not to imaginary ones. There can, in the nature of things, be no such thing as a street in navigable waters, unless it is in the shape of a causeway of wood, iron, stone, earth, or something equivalent.

I hold that the power to project and extend streets over tide lands granted by the thirty-seventh paragraph of the act of March 24, 1890, to cities of the first class, was intended to have precisely the same application to private persons as the seventh paragraph, which authorized them to lay out, open and extend streets, alleys, etc., and of the eighth, which authorized them to change the grade of streets. They can do none of these things without compensation to the owner of property taken or damaged, and as the right of preëmption inuring to a tide land improver is certainly property, he should be equally protected. The act of March 21st was passed with an emergency clause, and went into effect at once. The tide land act was passed two days later; and if there is any conflict between the two the latter should prevail.

ANDERS, J., concurs.

6	336
10	395
J10	399
33*	870
39*	111
39*	112
6	336
14	691

[No. 501. Decided May 10, 1893.]

E. C. NEUFELDER, *Assignee, Appellant*, v. THE GERMAN
AMERICAN INSURANCE COMPANY, *Respondent*.

FOREIGN CORPORATIONS—GARNISHMENT IN ANOTHER STATE—DE-
FENSE TO ACTION ON POLICY.

Where a foreign fire insurance company has been garnished in another state upon its indebtedness to a citizen of this state upon its policy of insurance, such fact is a good defense to an action in this state against the corporation.

Appeal from Superior Court, King County.

Strudwick, Peters & Van Wyck, for appellant.

Stratton, Lewis & Gilman, for respondent.

The opinion of the court was delivered by

ANDERS, J.—This action was brought by the appellant to recover from the respondent the sum of \$1,000 alleged to be due upon a policy of fire insurance issued by the respondent to one C. H. Knox, the assignor of the appellant. The respondent is a corporation incorporated and existing under the laws of the State of New York, and, at the time of issuing the policy under consideration, was lawfully authorized to transact business in this state. It also carried on business in Oregon, California and other states and territories on the Pacific coast, and had a general agent for the management of its business in all of said states and territories, including Washington, whose office was at San Francisco, in the State of California. Its funds for the payment of losses were kept by this general agent, or manager, at San Francisco, and disbursed by him as occasion required, the local agents in the several states having no authority to pay or settle for losses except by his special instructions. On September 11, 1890, the respondent

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issued a policy of insurance whereby it insured C. H. Knox against loss or damage by fire to the amount of \$1,000 on a stock of merchandise belonging to him, or in which he was interested, in Seattle, from the 11th day of September, 1890, to the 11th day of September, 1891, which policy was duly executed by the respondent through its president and secretary in the State of New York, and countersigned by its duly authorized agent in the city of Seattle and by said agent there delivered to said Knox. On the 19th day of September, 1890, the property so insured was destroyed by fire, and the loss was duly adjusted at the sum of \$1,000. On the 25th day of October, 1890, the assured made a general assignment for the benefit of his creditors, in accordance with the insolvency laws of this state, to the appellant, who accepted the trust and duly qualified as assignee.

After the loss occurred, and prior to the assignment of Knox to the appellant, certain creditors of Knox residing in San Francisco commenced actions in the superior court of the city and county of San Francisco, to recover the amounts due them, and caused the debt due from the respondent to Knox upon the insurance policy to be attached, in accordance with the laws of California, by delivering a copy of the writs of attachment to one Grant, the general agent of the company, together with a notice that the debt owing by respondent to the said Knox was attached in pursuance of said writs. The respondent admits its liability on the policy upon which this action was brought, and does not seek to evade the payment of the sum due, but contends that the levy of the garnishment process in California prior to the time of the assignment to the appellant is a bar to this action. Knox is a resident of this state, and no personal service was made upon him, nor did he enter an appearance in either of the actions in the State

of California in which the attachments were levied. The service of summons was made by publication, in the manner and for the length of time provided by the laws of California. Upon the facts found, concerning which there is no controversy, the court below entered judgment in favor of the respondent, and the question for our determination on this appeal is whether or not the court committed error in so doing.

It is contended by the appellant that the California court never obtained jurisdiction of the debt owing by the respondent to Knox, because the *situs* of the debt was either at the domicile of the creditor or at the domicile of the debtor, and in either event was not within the jurisdiction of the court. And the argument is that the claim of Knox against the insurance company is personal property, and, as such, follows the person of the owner, but that if its *situs* was at the domicile of the debtor, still it was in this state and not in California, for the reason that the policy of insurance was executed here, by a company doing business here, and whose domicile was therefore here for all purposes connected therewith, and especially for the purpose of suit upon the contract.

It is conceded by the respondent that by establishing agencies and doing business here and appointing an agent upon whom service of process should be made, as required by our statute, it became amenable to all the laws of this state concerning foreign corporations, including the liability to be sued for the enforcement of its obligations. And it is not contended by the respondent that the proceedings in the California court are entitled to any faith or credit here if that court had not jurisdiction of the respondent, and of the debt attempted to be garnished there. It is well settled that if a court has neither jurisdiction of the person of the defendant nor of his property, it has nothing

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before it upon which it can adjudicate, and that any judgment it may render under such circumstances is of no validity whatever. *Pennoyer v. Neff*, 95 U. S. 714.

But it is not necessary, in order that a valid judgment may be rendered, that both the person and property of the defendant be within the territorial jurisdiction of the court. If property is attached, and the defendant is not personally served, and does not appear, and publication of the summons is duly and regularly made, the court has jurisdiction to render a judgment personal in form, but which affects only what is attached. But such judgment will not authorize an execution against any other property, nor can it be made the basis of an action against the defendant. *Drake, Attachment* (7th ed.), § 5; *Cooper v. Reynolds*, 10 Wall. 308.

The first inquiry, therefore, is, was the property of Knox attached by the service of the writ and notice upon the respondent at San Francisco? And, there being no question as to the regularity of the garnishment proceedings, the answer must depend upon whether or not the respondent and the debt owing by it to the attachment defendant were within the jurisdiction of the court. There is no question but what the money to pay the debt was in the possession of the respondent at San Francisco, although the particular sum required had not been set apart for that purpose prior to the service of the garnishment process. The laws of California provide that any credit or other personal property in the possession or under the control of any person, or debts owing to the defendant, may be attached in the manner therein prescribed. See *Deering's Code Civ. Proc.*, §§ 542, 543, 544. And under such a statute there is no doubt that a resident may be charged as garnishee in respect of a debt he owes to a non-resident. But a non-resident is not subject to garnishment unless, when garnished, he have, in the state where the action is pending, and the

attachment is obtained, property of the defendant under his control, or he be bound to pay the defendant money, or to deliver to him goods at some particular place in that state. Hawes, Jurisdiction of Courts, § 253; 2 Drake, Attachment (7th ed.), § 474, and cases cited.

But it is claimed by the learned counsel for the appellant that this rule is not applicable in this case for the reason, as already stated, that the respondent cannot be deemed to have a domicile other than in this state, in respect to business transacted here, and for the further reason that the debt sought to be attached is and always has been at the domicile of the creditor in this state.

As to the validity of the policy of insurance, if that were in issue, we should say that the contract should be interpreted by the laws of this state. 1 May on Insurance, § 66; Wharton, Conflict of Laws, § 399; 3 Am. & Eng. Enc. Law, 551.

But we are not prepared to say that it can only be enforced in our own courts. On the contrary, we are of the opinion that the assured himself might have brought an action on his policy in California, or in any other state where the insurance company could be legally served with process.

It is no part or ingredient of the contract of insurance that it shall be enforced only in conformity to the law of the place where it is executed. *Griswold v. Union Mutual Ins. Co.*, 3 Blatchf. 231.

And as, in this instance, Knox could have collected his claim against the respondent in the courts of California, it follows that his creditors there had the same right to collect it by process of garnishment, and to apply the proceeds in satisfaction of their demands against him. In fact, garnishment, while in the nature of a proceeding *in rem*, is, in effect, an action by the defendant in the plaintiff's name against the garnishee, the purpose and result of which is to subrogate the plaintiff to the rights of the de-

May, 1898.] Opinion of the Court—ANDERS, J.

fendant against the garnishee. 2 Drake on Attachment (7th ed.), § 452.

As to the liability of foreign corporations to garnishment, we think the law is correctly summarized in 8 Am. & Eng. Enc. Law, p. 1131, as follows:

“Except, therefore, in those states where it is held that corporations are in no event subject to garnishment, a foreign corporation may be charged as garnishee in all cases where an original action might be maintained against it for the recovery of the property or credit in respect to which the garnishment is served.”

Although the *situs* of intangible personal property may be at the domicile of the creditor for the purpose of taxation or distribution, yet for the purpose of collection a debt is ambulatory, and accompanies the person of the debtor. We think this debt was properly attached in California. And that being so, the attachment proceedings there constitute a defense to this action. *Em-bree v. Hanna*, 5 Johns. 101; *Wheeler v. Raymond*, 8 Cow. 315, note a; *Andrews v. Herriot*, 4 Cow. 521; *Dittenhoefer v. Coeur d'Alene Clothing Co.*, 4 Wash. 519 (30 Pac. Rep. 661.)

In the case last above cited, this court held that where a foreign corporation does business in this state, under the laws prescribed by our legislature, and has an attorney appointed upon whom service in any proceedings in the courts in this state may be made, it thereby becomes subject to garnishment here. We have no doubt of the correctness of that decision, and are therefore bound to recognize the doctrine therein enunciated when affirmed by courts in other states which, like California, have statutes substantially like our own.

The further point is made by the appellant that the plaintiffs in the attachment suits, by filing their claims with the assignee (appellant), thereby abandoned any rights they

may have had under the attachments. If the objection is at all available, it is certainly not applicable to the action of Isadore Leviere, in which the amount sued for was \$2,439.21, and was made up of various assigned claims, only one of which was filed with the assignee in this state, and that only for the sum of \$279.92. The remaining attaching creditors cannot be affected by the action of those who filed their claims, and as the amount claimed is largely in excess of the debt attached, the result would be the same to the appellant, even if we should adopt the rule of law contended for by him.

The judgment of the court below is affirmed.

DUNBAR, C. J., and SCOTT and STILES, JJ., concur.

HOYT, J., dissents.

6	342
6	482
33*	825
33*	1058
6	342
190	123
6	342
24	81

[No. 757. • Decided May 10, 1893.]

GEORGE OVERBECK *et al.*, Respondents, v. G. M. CALLIGAN, Defendant, AND TACOMA MILL COMPANY, Appellant.

LOGS AND LOGGING — LIENS — SUFFICIENCY OF CLAIM — TIME OF FILING — ENFORCEMENT — VENUE.

Under the provision of §1679, Gen. Stat., that every person performing labor upon, or who shall assist in obtaining or securing saw logs, shall have a lien therefor, a notice of lien that alleges that the claim is for labor performed upon, and assistance rendered in preparing and securing certain saw logs, is sufficiently definite.

The thirty days' limitation for the filing of liens for labor in securing saw logs does not begin to run from the time such logs are rafted into booms, but from the time the services rendered in securing the logs ends.

An action to foreclose a logger's lien is properly brought in the county where the logs were cut and the lien notice filed, regardless of the fact that the logs are in another county. (HOYT and STILES, JJ., dissent.)

May, 1898.] Opinion of the Court—DUNBAR, C. J.

Appeal from Superior Court, Island County.

Crowley & Sullivan, and W. C. Sharpstein, for appellant.

Fremont Cole, and Joseph H. Dawes, for respondents.

The opinion of the court was delivered by

DUNBAR, C. J.—We are unable to recognize the force of appellant's contention, that the claimants have failed to comply with the statutes in that the terms and conditions of their respective contracts are not stated in the lien claims, or that the services rendered are not sufficiently set forth. If, as the appellant asserts in its brief, the lien notices simply stated that the services were rendered in cutting, sawing and preparing logs, or in cutting, securing or preparing logs, there might possibly be some force in the claim that the allegations of the lien notice are not sustained by the evidence, but the lien notice does not restrict the work to cutting, sawing or preparing, or to cutting, securing and preparing, but in each instance it alleges that the claim is for labor performed upon and assistance rendered in preparing and securing, etc. This, we think, is an intelligent compliance with the statute. The statute says that every person performing labor upon or who shall assist in the obtaining or securing of saw logs, etc., has a lien upon the same for the work or labor done in obtaining or securing the same.

If this description is not definite enough, what rule of definiteness must we adopt? If we require the claimants to go further into particulars than these claimants have gone, then logically we must require each claimant to state whether he used an ax or a saw or a canthook, and if all three, what portion of the time he was engaged in all the different, multifarious employments around the logging camp. This would be an absolutely useless requirement.

The statute provides that the cook of the logging camp shall be regarded as a person who assists in obtaining or securing the timber, but we do not understand that the cook in filing his lien must state that he was employed as a cook, but that his allegation of services rendered in preparing and securing the logs is sufficient, but when he states that he was employed to render assistance in securing the logs, with the amount that he is to receive, that he has sufficiently stated his contract, and if he proves that he was cooking in a logging camp, the language of the statute is simply a declaration that such services fall within the general provisions of labor performed upon and assistance rendered in cutting, sawing, securing, etc.

The business of carrying on a logging camp is a dependent business. It requires many different kinds of work, more or less distinct, it is true, in their character, but all tending towards a consummation of one object, viz., securing the logs prepared for market. So far as notice to purchasers is concerned they would not be assisted in any particular by a technical description of the work performed.

Appellant quotes at some length from the opinion of this court in *Warren v. Quade*, 3 Wash. 750 (29 Pac. Rep. 827), which was a case of a lien for materials furnished. The construction there given was a construction of another statute, but even presuming it to be the same, what was decided in that case was, that the terms and conditions of contract set forth in a claim of lien should include a sufficient description of the materials furnished or work done to enable the owner to intelligently determine as to the *bona fides* of such contract, and the reasonableness thereof. Taking that decision for a guide here we think the description of the labor performed and the terms of the contract are sufficient.

A more troublesome question is raised by the assertion

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of appellant that several claims are mingled in a lump charge in each of these claims, for one of which the claimant is not entitled to a lien, and that, under the authority of *Dexter Horton & Co. v. Sparkman*, 2 Wash. 166 (25 Pac. Rep. 1070), the lien must fail. If there is such a commingling there is no doubt of the correctness of appellant's contention. But is this a case for the application of the law invoked? It is true there were two booms of logs, and that more than thirty days had elapsed since the labor on the logs in one boom had been performed. But there is nothing in the statutes making a division of the logs into booms, or recognizing booms in any way as affecting the interests of the laborers. These claimants were not employed to work on any particular boom, as men are employed to work on a particular house or structure. Generally men are employed in logging camps to work by the month or by the season. Booms may be large or small. One might be prepared every month, or every week, or possibly every day. The statute provides that the claimant shall have thirty days to file his notice of lien—from when? Not thirty days from the time the boom is completed, but from the time the services rendered in securing the logs ends. We have no doubt that some inconvenience may arise from this construction of the law, but any other construction will render the logger's lien practically inoperative, and logically force him to keep a surveillance over every particular log which he cuts, and be at the expense of filing a lien every thirty days. The division of logs into booms is purely arbitrary, and such division, in the absence of any law providing for it, should not affect or restrict the claimant's right of lien.

So far as the jurisdictional question is concerned, we have only to say that our statute makes no provision for seizure, as do the statutes of most of the other states, but the statute provides a method of foreclosure, and obviates

the necessity of an attachment. It cannot be concluded from the analogies of our statutes on the respective foreclosures of chattel mortgages and of loggers' liens, that the latter ought to be foreclosed in the same manner. There is a special rule in § 1689, Gen. Stat., for the enforcement of loggers' liens, which provides that they shall be enforced in any of the superior courts of the state. In the case of chattel mortgages, if the property is removed from the county where it was when the mortgage was given, the mortgage must be filed in the county to which the property was removed before it becomes a lien in that county. But the law makes no such provision in the case of loggers' liens, but simply provides that the lien must be filed in the county where such logs were cut. In this case the action was brought in the county where the logs were cut, where the lien was filed, and where the owner of the logs resided, and we think it was properly brought there.

Believing that no prejudicial error has been committed in the case, but that substantial justice has been done, the judgment will be affirmed.

ANDERS and SCOTT, JJ., concur.

HORT, J. (*dissenting*)—I think the judgment in this case should be reversed, for the reason that the superior court of Island county had no jurisdiction of the subject matter of the action. The provision as to jurisdiction of the superior courts in the lien law itself is simply a declaration that litigation under said law is cognizable in courts of that grade instead of those of any other. It cannot be held that by such provision it was intended that such actions might be brought in any superior court of the state regardless of all other statutory provisions as to jurisdiction. It could never have been intended that the superior court of Walla Walla county could take jurisdiction in cases of this kind, when all of the parties to, and the sub-

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Dissenting Opinion — HORT, J.

ject matter of, the suit were located in the county of Pierce. Such being the case, we must look to the general provisions of the statute to determine as to what court has jurisdiction in any particular case. Such actions, in my opinion, necessarily involve the right to the possession of, or title to, specific personal property, and under the express provision of § 158, Code Proc., must be commenced in the county in which the property, or some part thereof, is situated. And if not governed by said section they must be controlled by the rule which obtains as to the foreclosure of chattel mortgages, under which rule the action must likewise be commenced in the county where the property, or some part thereof, is situated.

I do not see how the construction of these statutes as to jurisdiction is in any way affected by the fact that, in order to retain the lien in the case of a chattel mortgage, the mortgagor must, upon the removal of the property from the county in which the mortgage is recorded, either enforce such mortgage by foreclosure or else have his mortgage again recorded in the county to which such property has been taken, while it is not necessary so to do in the case of liens under said statute. These provisions, to my mind, have no influence whatever upon the interpretation of the statute, which in terms provides that the action must be brought in the particular county in which the property is situated, regardless of any question as to where the notice of lien which is to be enforced is of record. The statute makes the location of the property the basis of jurisdiction, and not the place where evidence of the lien may be found.

There are other points raised in the brief of appellant; some of which, in my opinion, are well taken, but it is not necessary to discuss them here.

STILES, J., concurs.

[No. 823. Decided May 10, 1893.]

YAKIMA NATIONAL BANK, *Respondent*, v. ROBERT KNIPE,
Appellant.NEGOTIABLE INSTRUMENTS—EVIDENCE—ALTERATION OF NOTE—
PRESUMPTION—OWNERSHIP—PROOF OF INCORPORATION—IN-
TEREST—HARMLESS ERROR.

Although a promissory note may show upon its face that it has been changed after it was originally written, yet, in a suit thereon, it may be offered in evidence, as the presumption is that the note was in the same condition when signed as when offered in evidence.

The fact that plaintiff is a corporation may be *prima facie* established by parol proof that it is carrying on a general banking business as a national bank under the name by which it has brought suit, as judicial notice will be taken by the court of the general laws of the United States which authorize national banks.

In an action upon a promissory note by an indorsee, who makes the payee a party defendant, the production of the note in evidence with an indorsement in blank thereon, is sufficient to *prima facie* establish the fact that the plaintiff is the owner.

Under the legislation of this state the established rate of interest is ten per cent., and can be properly charged by national banks.

The fact that the court, in an action upon a promissory note, assessed the amount of attorney's fees due thereon, and added same to the verdict of the jury, is not prejudicial error.

Appeal from Superior Court, King County.

Pratt & Shank, and Thompson, Edsen & Humphries,
for appellant.

Preston, Carr & Preston, and W. R. Bell, for respondent.

The opinion of the court was delivered by

HOYT, J.—This action was brought to recover the amount alleged to be due upon a certain promissory note made by the defendant Knipe to defendant Dorffel, and by him indorsed to the plaintiff. The defendant Knipe, in his answer, after making certain general denials, set up two

6	348
8	688
33*	834
36*	1094
6	348
11	3
33*	834
36*	277
6	348
12	146
14	506
6	348
16	589
6	348
28	79
6	348
32	196

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Opinion of the Court—Hoyt, J.

affirmative defenses and one affirmative partial defense. The first of said affirmative defenses was that the note had been altered after delivery, without his consent. The second was that the plaintiff was not the real party in interest. The partial defense was that a portion of the amount due upon the note had been paid by defendant Dorffel. These affirmative defenses were severally put in issue by the reply. When the case was called for trial the plaintiff offered in evidence the note sued upon. The defendant Knipe objected to its introduction in evidence on several grounds. The one upon which most stress seems to have been placed, and to which the attention of the court was especially called, was that the note showed upon its face that it had been changed after it was originally written, and that, such being the fact, it could not be put in evidence until there had been some explanation as to such change. The court overruled such objection, and the note was received in evidence, and this ruling presents the principal question involved in this appeal.

The question thus presented is an important one, and the authorities are not harmonious in regard thereto. It is, however, no longer an open one in this court. Substantially the same question was raised in the case of *Wolferman v. Bell*, ante, p. 84, and we held that there was a presumption that an instrument in writing was in the same condition when signed that it was when offered in evidence, and that such presumption was not changed by the fact that the instrument showed upon its face that the original draft thereof had been changed. The special concurrence of three of the judges in the opinion would seem to indicate that only a minority of the court had held as above stated. Such, however, was not the case, as a majority of the court concurred in what was thus held, and limited their concurrence on account of what was said upon other questions. Such holding is decisive of the question under considera-

tion, and, as we are satisfied with what we then held, it follows that, in our opinion, the note, when received in evidence, made a *prima facie* case against the defendant, so far as this principal question was concerned.

There were, however, several other objections made to the introduction of said note, and as to the action of the court in instructing the jury. The questions thus raised can well be discussed in a general way, and without passing upon each objection separately. One of such objections was that no legal proof of the fact that the plaintiff was a corporation had been introduced. Upon this question, when all the pleadings are taken together, it is doubtful whether or not it was necessary for the plaintiff to prove such fact. The second affirmative defense above mentioned, when interpreted in the light of the reference therein made to the partial affirmative defense, seems to qualify the denial of incorporation made in the first part of the answer. but whether or not this be so, we think the proof offered was sufficient to *prima facie* establish the fact of incorporation. This court will take judicial notice of the general laws of the United States, and, such being the fact, we think it was competent for the plaintiff to prove by parol that it was carrying on a general banking business as a national bank authorized by the general laws of the United States under the name by which it had sued. We are unable to see any reason why a corporation *de facto* may not be proven by this kind of testimony.

Another contention of appellant was that there was no proof that the plaintiff was the real party in interest. Under the affirmative allegations in his answer the appellant might well be held to have admitted that the plaintiff was the owner and holder of said note, notwithstanding the fact of the general denial in such answer; but in the absence of such admission in the pleadings, the note, when introduced in evidence by the plaintiff, with what purported to

May, 1893.] Opinion of the Court—HOYT, J.

be an indorsement in blank thereon, *prima facie* established the fact that the plaintiff was the owner and holder thereof. Especially is this true where, as in this case, the indorser is made a party to the action against the maker. No other person than such indorser and the plaintiff are shown to have had any connection whatever with the note; and since any claim which the indorser might make thereto would be fully determined by the adjudication in the action, it follows that no possible injury could result to the maker by reason of the action being prosecuted in favor of the plaintiff instead of in favor of the payee. Under such circumstances, the court should demand only slight proof to establish a *prima facie* case, and when the note was introduced in evidence, indorsed in blank, such *prima facie* case was made out. In fact many courts have held that the production upon the trial of a promissory note made to order was *prima facie* proof of the title of the holder who was not the payee named in the note, even although it did not purport to have been indorsed.

It is further objected by the appellant that the amount of the verdict was excessive, for the reason that no interest should have been allowed, as the stipulation for 10 per cent. interest was in violation of the national banking law. We think, however, that under the legislation of this state there is an established rate of interest, which is 10 per cent., and that the fact that by special contracts different rates may be collected does not affect the question as to said 10 per cent. being the established rate of the state. This being so, it follows that the national bank could properly charge that rate.

This disposes of all the questions excepting that growing out of the action of the court in taking the question of the assessment of the amount due by the terms of the note as attorneys' fees from the jury, and assessing it himself, and adding it to the amount of the verdict; but this, if

error, was not such an error as should reverse the case. There was no proof introduced on the part of the defendants, and the only proof on the part of the plaintiff, outside of that as to its incorporation, was the note itself. And as the construction of said note was a question of law, for the determination of the court, there was no question of fact, excepting as to such incorporation, to go to the jury. Under these circumstances, it would have been entirely competent for the court to have estimated the amount of interest and of the attorney's fee, and to have instructed the jury, if they found the question of incorporation to have been proven, to return a verdict in the amount so estimated by him to be due upon the note. Hence defendant was not injured by the fact that as to the attorney's fee the court itself determined the amount and added it to the verdict instead of instructing the jury to include it as a part thereof.

Upon the whole record, we find no reversible error, and the judgment must be affirmed.

DUNBAR, C. J., and SCOTT and ANDERS, JJ., concur.

STILES, J., dissents.

6	252
38	533

[No. 641. Decided May 12, 1893.]

THE STATE OF WASHINGTON, *on the relation of Dewitt L. Boyd and Mary Boyd*, v. THE SUPERIOR COURT OF PIERCE COUNTY, AND FREMONT CAMPBELL, *Judge, Respondents*.

CERTIORARI—WHEN LIES—SERVICE BY PUBLICATION—AFFIDAVIT—SUFFICIENCY OF PUBLICATION.

The jurisdiction of the supreme court to inquire into the proceedings of the superior court under a writ of *certiorari*, is not dependent upon the amount in controversy; but the writ will lie whenever judgment is rendered by the superior court without proper service of summons. (DUNBAR, C. J., dissents.)

May, 1893.] Opinion of the Court—ANDERS, J.

An affidavit, upon which publication of summons in an action is based, is not sufficient under Laws of 1887-8, p. 26, § 5, when it alleges merely that the defendants "are absent from the county of Pierce, and that their place of residence is unknown."

Under a statute requiring publication of summons to be made not less than once a week for six consecutive weeks, six publications is sufficient, where it is made once in each of six consecutive weeks.

Original Application for Certiorari.

Taylor & McKay, for relator.

A. A. Knight, for respondents.

The opinion of the court was delivered by

ANDERS, J.—On December 9, 1890, one M. O'Neill commenced an action in the superior court of Pierce county against the relators to recover the sum of \$55.45 alleged to be due for groceries sold and delivered by him to the relators. A writ of attachment was sued out and levied upon certain real estate in Cavender's Addition to the city of Tacoma. Service of the summons was made by publication. On the 21st day of February, 1891, a default judgment was rendered against the defendants for the amount claimed in the complaint, together with interest and costs. Subsequently the defendants moved the court to vacate and set aside the judgment, on the ground that the court had no jurisdiction to render it, and that the same was otherwise wrongful and unwarranted. The motion was denied and thereupon the defendants caused the record to be brought up to this court by writ of *certiorari*. The respondent moves to quash the writ and to dismiss the proceedings for the alleged reasons that this court can only issue the writ in aid of its appellate jurisdiction, and that the amount in controversy, being less than two hundred dollars, is not sufficient to confer jurisdiction upon the court to determine this controversy.

While it is undoubtedly true that the supreme court may issue the writ of *certiorari* whenever necessary to the complete exercise of its appellate jurisdiction, we think it also has jurisdiction to award the writ in proper cases where its appellate power is not called into exercise. And, as in proceedings of this character, the court generally looks no further into the case than may be necessary to determine whether the tribunal from which the record comes had jurisdiction, and if not, or if it exceeded its jurisdiction or proceeded illegally, whether there is any appeal or any other plain, speedy and adequate remedy, it would seem to follow that jurisdiction to enquire into such matters could in nowise depend upon the amount in controversy. The motion to dismiss must, therefore, be denied.

It is contended by the relators that the affidavit for service of the summons by publication was insufficient and not in accordance with the requirements of the statute, and that publication of the summons was not made for the requisite length of time to confer jurisdiction upon the court to enter judgment by default against them. The statute in force at the time these proceedings were had, provided that in case service cannot be made in any other prescribed manner by reason of the absence of the defendant, which may be shown by the affidavit of the plaintiff or his attorney, the summons, with a brief statement of the object of the action, may be served by publication thereof in some weekly newspaper printed and published and of general circulation in the county in which the court is held, if such newspaper there be, otherwise in some newspaper printed and published in the territory [state], which summons shall be published not less than once a week for six consecutive weeks, and shall require the defendant to appear and answer the complaint within sixty days from the date of the first publication thereof. And it further provides that before publication of the summons is made, the complaint shall

be filed with the clerk of the court where the action is pending, and forthwith upon publication the plaintiff shall cause a copy of the summons to be deposited in the post-office, the postage thereon being prepaid, directed to the defendant at his place of residence, unless it shall appear that such residence is not known to, or cannot after reasonable diligence be ascertained by, the plaintiff or his attorney; and before the hearing of the action the court or judge shall be satisfied by affidavit or other proof that all the provisions herein contained have been complied with, provided that personal service out of the territory [state] shall be equivalent to publication. Laws 1887-8, p. 26, § 5.

The affidavit upon which the publication was based stated that "Dewitt L. Boyd and Mary Boyd are absent from the county of Pierce, and that their place of residence is unknown." Did this affidavit state facts sufficient to authorize the publication of the summons, is the first and principal question to be determined. If it did not, then there was no proper service of the summons and the court was without jurisdiction of the person of the defendants, and the judgment is invalid. In such cases jurisdiction depends entirely upon a strict compliance with the terms of the statute. *Brown on Jurisdiction*, §§ 51, 52.

As we have already seen, publication could only be resorted to, as a means of service, when rendered necessary by reason of the absence of the defendants. And the word "absence," as used in the statute, does not mean simply being away from a usual place of residence within the jurisdiction of the court, for, in such cases, the summons may be served by delivering a copy thereof to some suitable person at the dwelling house or usual place of abode of the defendant. Laws 1887-8, p. 26, § 4. Nor does it necessarily mean not being within the county where the action is pending, for the defendant may be personally served, if found, in any other county in the state.

It would seem, therefore, that the legislature used the word absence as the equivalent of non-residence, and only intended to authorize service by publication in cases where the defendant resides out of, and is therefore absent from, the state. If this be not so, it is difficult to understand why the legislature should have substituted this statute for § 64 of the Code of 1881, which expressly provided, among other things, that service of summons might be made whenever it appeared by the affidavit of the plaintiff or intervenor, or an attorney of the plaintiff or intervenor, in the action, that the person on whom service was to be made could not, after due diligence, be found within the territory, or concealed himself to avoid the service of summons. But, however this may be, we are clearly of the opinion that the affidavit filed by the respondent was not sufficient to justify a publication of the summons. It might have been true that the defendants—relators here—were absent from Pierce county, and their residence unknown, and yet it might not have been the fact that they could not have been personally served “by reason of absence.” If they were in the state, though not in Pierce county, they were not absent in contemplation of the statute, even although their residence was at the time unknown. It follows, therefore, that no proper service of the summons upon the relators was had, and that the judgment complained of must, for that reason, if for no other, be held invalid.

But there are other defects in the record. It does not appear that a printed copy of the summons as published, was returned with the affidavit of the publisher of the newspaper in which the publication was made, nor that any proof of the plaintiff's demand was made before entry of the judgment by default. Neither does it appear that upon publication a copy of the summons was deposited in the postoffice, the postage thereon being prepaid, directed to

May, 1898.] Dissenting Opinion—DUNBAR, C. J.

the relators, as required by law, at their place of residence, nor that said residence was, at that time, unknown to the plaintiff or his attorney, or could not, after reasonable diligence, be ascertained.

As to the time of publication of the summons, we think it was sufficient. The statute requires the publication to be made not less than once a week for six consecutive weeks, and it was published once in each of six consecutive weeks, and that was all that was required, although but six publications were made. See *Wade on Notice*, § 1101; *Swoett v. Sprague*, 55 Me. 190; *Ronkendorff v. Taylor's Lessee*, 4 Pet. 349.

It is insisted by the learned counsel for the respondent—(1) That the judgment in this case cannot be attacked collaterally; and (2), that the relators have not shown themselves entitled to have it set aside for the reason that their application to the court for that purpose was not made in the mode prescribed by law. But it is a sufficient answer to the first proposition to observe that this is not a collateral attack upon the proceedings of the court below; and to the second, that a judgment rendered without service of summons will be reversed on *certiorari* whenever objected to upon that ground.

Judgment reversed.

SCOTT, HOYT and STILES, JJ., concur.

DUNBAR, C. J. (*dissenting*).—I dissent. It seems to me that the appellant here is simply allowed to evade the constitutional prohibition against appeals from the superior courts where the amount in controversy does not exceed the sum of \$200. This is but another method of appeal; and the appellant secures a ruling of this court on the same questions that he would on an appeal. The constitution provides that the supreme court shall have power to issue

writs of *certiorari*, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. It certainly has no appellate or revisory jurisdiction over actions where the amount involved is less than two hundred dollars, and no jurisdiction at all; for it was evidently the intention of the framers of the constitution to entrust all questions involved in cases of that kind to the discretion of the superior court. They certainly did not intend to make a useless provision and allow litigants to avail themselves by indirectness of a privilege which was directly prohibited.

[No. 788. Decided May 12, 1893.]

HENRY S. ALGER, *Appellant*, v. ALICE S. HILL, *Erector*, AND J. VANCE LEWIS, *Respondents*.

PUBLIC LANDS—ENTRY WITHIN CORPORATE LIMITS—KNOWLEDGE OF ENTRYMAN.

Under the act of congress of March 3, 1877 (19 St. at Large, p. 392), where entry had been regularly made upon vacant unoccupied land of the United States, within the limits of an incorporated town, which was not settled upon, nor used for municipal purposes, and such land was afterwards ascertained to be within the corporate limits of a town, it was the duty of the secretary of the interior to issue a patent therefor to the entryman, regardless of knowledge on the entryman's part that such land was within the corporate limits. (Hoyt, J. dissents.)

Appeal from Superior Court, King County.

Struve & McMicken, and Hughes, Hastings & Stedman.
for appellant.

Junius Rochester, for respondents.

May, 1893.] Opinion of the Court—STILES, J.

The opinion of the court was delivered by

STILES, J.—We see no reason for not adhering to the conclusion arrived at in this case when it was here before. *Alger v. Hill*, 2 Wash. 344 (27 Pac. Rep. 922). Upon the trial of the case the learned judge of the superior court seems to have proceeded upon the theory that our decision upon the former appeal was based solely on the action of the land officers in concluding that Minnick had knowledge that his land was within the corporate limits of the city of Seattle, because he was marshal of that town; and as, at the trial, the production of the secretary's decision showed that there were other facts before him which tended very strongly to show that Minnick did know that the boundaries of the city, as fixed by the territorial statute of 1869, included his land, the judgment of the court was in respondents' favor. But it was the intention of this court to express in the former decision that in its view the act of 1877 did not depend upon the knowledge of the entryman, but upon the ascertainment that the land was within corporate limits by the land officers. That part of the opinion found on pages 350-1 was devoted to that subject and terminated in what would seem to be a clear statement:

“To the entryman no knowledge of the law or the fact was imputed under this act; and tried by this interpretation, Minnick was entitled to have the benefit of its provision.”

The history of the case, as appears from the record, is as follows: Minnick made his final proof and was allowed to enter the land May 4, 1875, and for all that appeared in the land office he would have received a patent in the due course of business. But at some subsequent date the city of Seattle sought to have this land and other similarly situated lands patented to it, and, to clear the record of the entries of Minnick and others, initiated a contest, the purpose of which was to show that its corporate limits in-

cluded all the tracts then in question. This contest was successful, for, although the right of the city to have patent was denied, it was in the course of the proceeding ascertained by the commissioner that Minnick's tract was within the limits of the city of Seattle, under its charter of 1869, and therefore not subject to entry, and his entry was ordered cancelled January 12, 1877. Sixty days were allowed for an appeal, and an appeal was duly taken. But before the expiration of the time for appeal even, and on March 3, 1877, the act of that date became operative.

Upon the appeal to the secretary his attention was called to the new act, and he was asked to order the patent upon the ground that the tract applied for included only vacant, unoccupied lands of the United States not settled upon or used for municipal purposes, nor devoted to any public use of a town. The facts found by the commissioner and reiterated by the secretary showed the land to be of the character intended by the act; and the refusal of the latter officer was in the following language:

“With reference to the entry of Minnick it will be observed that the section above quoted (§ 2, act March 3, 1877), confirms such entries only as have been allowed for land ‘afterward ascertained’ to be within the corporate limits of a town. The testimony in this case shows that during most of the period of Minnick’s alleged residence on the land he was the marshal of the city of Seattle; that he voted in the city election in 1874, and exercised all of the rights and privileges claimed and exercised by other citizens of the city. His authority as marshal was confined to the corporate limits of the city, and it was impossible for him not to have known as a matter of fact that the land claimed by him was within the city limits. This section was not intended to confirm entries made within the corporate limits of a city by a person who had full knowledge of the fact that the lands were so situated at the time the entries were made, and said entry does not fall within the remedial provisions of the section, and is not confirmed.”

May, 1898.] Opinion of the Court—STILES, J.

Considering what an incorporated town is, we think it may well be doubted whether any man ever proceeded so far with an application for patent for government land, as the making of his final proof and the allowance of entry, without finding out to a legal and moral certainty whether or not he was within corporate limits. To presume such cases would be to convict the land locators of this country of a degree of ignorance and stupidity which the facts do not warrant. And to assume that congress was legislating for such people alone as neither knew nor could learn anything about the relations of the land they lived on to their nearest town, would doubtless startle that body by the novelty of the proposition. Yet the act of 1877 was intended to benefit somebody, and to confirm some entry canceled because afterward ascertained to be embraced within corporate limits, and if there could be a case for the operation of that law where the entryman was a man of any degree of intelligence, the case at bar must be one.

We hold that the land was "ascertained" to be within the corporate limits of Seattle by the commissioner's decision of January 9, 1877, long after the entry; and that, inasmuch as the entry was conceded to have been in all other respects regular, it was the duty of the secretary to order a patent to issue to Minnick when the case came before him. The fact that a cancellation had been ordered by the commissioner cuts no figure. In every case of entries made upon land afterwards ascertained to be not subject to entry, the necessary result is a cancellation of the entry; but this act passed over all cancellations and confirmed the entries wherever there were no intervening rights, and the lands were of the class provided for.

Judgment reversed, and remanded for a new trial in accordance with this opinion.

DUNBAR, C. J., and ANDERS and SCOTT, JJ., concur.

HOYT, J. (*dissenting*).—I dissent. The proofs show clearly that the secretary of the interior found as a fact that Minnick had full knowledge that the land was within the corporate limits of the city of Seattle at the time he made entry thereof, and this being so, for the reasons given by me when the case was here before, I think that he was not entitled to any of the benefits of the curative statute of March 3, 1877, and that the action of the land department in refusing to allow his entry was correct, and he should be allowed to assert no rights by virtue thereof against the patent under which the respondents hold.

6	362
8	499
33*	832
36*	467

[No. 824. Decided May 17, 1893.]

EDMUND SEYMOUR *et al.*, *Respondents*, v. THE CITY OF SPOKANE, *Appellant*.

MUNICIPAL CORPORATIONS—WARRANTS—RATE OF INTEREST.

In this state, municipal corporations are liable for interest at the legal rate—ten per centum—upon the amounts due from them from the time that a warrant therefor has been issued and payment thereof refused for want of funds.

Ch. 2, § 19, of the freeholders' charter of Spokane, limiting the interest upon city warrants to 8 per cent. per annum, applies only to warrants given for money borrowed on the credit of the city.

Appeal from Superior Court, Spokane County.

P. F. Quinn, for appellant.

Alfred E. Buell, for respondents.

The opinion of the court was delivered by

HOYT, J.—Certain judgments had been rendered against the city of Spokane, and in payment thereof said city is

May, 1898.]

Opinion of the Court—Hoyt, J.

sued its warrants upon its treasurer, which warrants were accepted by the owners of such judgments, and presented to the treasurer for payment, which was refused for the reason that there were no funds in the treasury applicable to such payment. Said warrants were afterwards paid to the holders thereof, with interest thereon at the rate of 8 per cent. per annum. At the time of such payment the holders demanded interest from the date of presentation for payment at the rate of 10 per cent., and accepted the lesser rate under protest, and this action was brought to recover the 2 per cent. interest which the city had refused to pay. The question as to whether or not the acceptance of such warrants was a payment of the judgments has been argued by counsel, but a decision thereof is unnecessary, in view of our conclusion as to the other questions raised. Two reasons are suggested by the attorney for the appellant why the city should not pay interest on its warrants at the rate of 10 per cent.—*First*, That under the provisions of § 19 of chapter 2 of its charter, the rate of interest on its warrants is limited to 8 per cent. per annum; *second*, that, if such provision of the charter is not applicable to warrants of this kind, then there is no provision whatever requiring the payment of any interest.

As to the first suggestion, the claim of the respondents that such provision of the charter has no application to warrants of this kind must be sustained. The section in question confers upon the city of Spokane the authority to borrow money on the credit of the city, and to secure the same by the issue of its warrants, payable at a specified time, with a rate of interest named therein, not to exceed the rate of 8 per cent. per annum, but does not in any manner refer to warrants issued in the ordinary course of business, in payment of claims against the city. It clearly contemplates only a voluntary loan, and the paper to be issued, though in the form of a warrant, is substantially

the promise of the city, payable in the future, and might as well have been called a promissory note as a warrant. It follows that this section of the charter could have no influence in determining the rate of interest to be paid upon the warrants in question.

The other suggestion of the appellant is founded upon the fact that there is no express provision in its charter requiring it to pay interest on warrants of the kind under consideration. Warrants of this kind, regularly, should be issued only when there is money in the treasury to meet them. Such was the intention of the legislature, when it provided the method by which municipal corporations should pay claims against them. But ever since the organization of the territory a general practice has prevailed, of drawing such warrants for all claims, regardless of the question as to whether or not there were funds in the treasury to meet them, and during the whole of this time there has prevailed a uniform custom of paying interest upon such warrants at the legal rate from the date of their presentation to the treasurer for payment until they were actually paid. That such a practice was legitimate and proper in a moral sense, there can be no doubt. An amount of money due from a city or other municipal corporation should draw interest until it is paid, the same as if due from a private person: and while it is probably true that, under the strict rules of law, interest could not be collected upon money due and unpaid by a municipal corporation without some legislative provision therefor, there is no good reason for such rule. This fact being recognized, the practice of paying interest, as above stated, grew up; and this practice has been so universal, and has been so frequently recognized by the legislation of the territory and state, as to give it the force of a law. The legislature, in numerous instances, has recognized as a portion of the liabilities of corporations of this kind interest on its indebtedness, evidenced by war-

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rants of the kind in question. From this practice, and its recognition by the legislature, it must be held that in this state municipal corporations are responsible for interest upon the amounts due from them, from the time that a warrant therefor has been issued, and payment thereof refused for want of funds; and if liable to pay interest at all, it is too clear for argument that they must pay at the legal rate.

The contention of the respondents, that they were entitled to ten per cent. interest, was correct, and the judgment of the superior court must be affirmed.

DUNBAR, C. J., and STILES, ANDERS and SCOTT, JJ.,
concur.

[No. 940. Decided May 17, 1893.]

J. H. GERMOND, *Appellant*, v. THE CITY OF TACOMA,
ARVID RYDSTROM, D. L. DEMOREST AND JOHN N.
FULLER, *Board of Public Works, Respondents*.

MUNICIPAL CORPORATIONS—BONDS FOR INTERNAL IMPROVEMENTS
—CONSTITUTIONAL LAW—CITIES OF FIRST CLASS.

The act of March 9, 1893, entitled "An act relating to internal improvements in cities, authorizing the issuance and collection of bonds upon the property benefited by local improvements, and declaring an emergency," is constitutional, and is applicable to cities of the first class, as well as to all other cities.

Where an act, general in terms, contains such reference to special acts as to show an intent on the part of the legislature thereby to repeal or change them, the rule that general acts have no effect upon special ones, though covering the same subject matter, must yield to the manifest intention of the legislature.

Appeal from Superior Court, Pierce County.

Parsons, Corell & Parsons, for appellant.

F. H. Murray, for respondents.

The opinion of the court was delivered by

HORT, J.—Two substantial questions are presented for our consideration upon this appeal—(1) Does the act of March 9, 1893 (Laws 1893, p. 231), entitled “An act relating to internal improvements in cities, authorizing the issuance and collection of bonds upon the property benefited by local improvements, and declaring an emergency,” apply to cities of the first class; and (2), is said act constitutional?

As to the first question, it is claimed by the appellant that, under the rule that acts of a general nature will not repeal special ones, it must be held that the act in question does not in any wise affect the enabling act under which cities of the first class were allowed to frame charters for themselves. His argument in that regard being that the last named act, though a general one within the meaning of our constitutional provision, was a special one so far as the application of said rule is concerned; that it in terms related only to cities of a certain class, and therefore was special legislation relating to that class, while the act under consideration was an act in terms applicable to all cities, and therefore a general one within the meaning of said rule. The general proposition of law as thus contended for by the appellant is too well settled to be longer open to question. The reason for the rule is that it will not be presumed that the legislature when enacting a general law had in mind every special law upon the same subject, and for that reason, to prevent the legislature from doing that which it had no intention to do, it is necessary to hold that such general acts have no effect upon special ones though covering the same subject matter.

The real question, however, in the investigation of acts of this kind, is to determine the intention of the legislature, and if an act general in terms contains such reference to

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special acts as to show an intent on the part of the legislature thereby to repeal or change them, such intention must have force, notwithstanding the rule above mentioned. An act the most general in its nature may, by a special reference to some particular thing or class of things, show clearly an intent on the part of the legislature to make such general act the rule as to such particular thing or class, and when this appears, the intent of the legislature thus manifested must be given effect by the courts.

Applying these principles to the act in question, we think it must be held to apply to cities of the first class as well as to all other cities. This is reasonably evident from the general language in the title and body of the act. Such language makes the act in terms apply to any city of the state, while the course of legislation has been to make an act apply only to a particular class of cities unless the legislature intended it to apply to all classes.

But if we were in doubt upon this proposition from the use of this general language, we can no longer be in doubt as to the intention of the legislature when we interpret the act in the light of the provisions of § 4, "that nothing herein shall be construed as repealing or modifying any existing manner and method for cities of the first class to make improvements as herein provided for, but shall be construed as an additional and concurrent power and authority." This language shows to an absolute certainty that the legislature had in mind cities of the first class, and intended to make this act applicable to them; that it did not intend to deprive them of the benefits of any of the provisions of their charters as to the making of such improvements, but did intend to allow them to make use of the authority granted by the act, if they saw fit so to do.

Upon the next proposition counsel for appellant has prepared an elaborate brief and has ably presented to the court every objection which it seems possible to raise against the

validity of said act. We shall not attempt to discuss separately the several objections thus raised. It is sufficient to say that the great majority of them seem to us to go to the policy of the act, and could in no manner affect its validity. Many of the questions thus raised would be of great force if presented to the legislature, but with the effect which the act may produce, we have nothing to do unless by reason thereof some constitutional right is affected. Except as controlled by the constitution, the legislature is free to determine as to all matters of this kind, and however well satisfied we may be that the method prescribed by it for accomplishing a certain result is not the best that might have been devised, it is beyond our power to say for that reason it shall not have force. All we can do is to determine whether or not any provision of the constitution has been violated by the legislation under consideration, and if it has not, the legislation must have force. And in the investigation of this question it is our duty to give the benefit of any doubt that we may have upon the proposition to the legislation, and unless we can clearly see that some provision of the constitution has been violated, we must assume that there has been no such violation.

In view of these considerations, it is clear that with nearly all of the objections made to this act we have nothing to do. For instance, it is suggested that the rate of interest which a property owner is required to pay to release his property from the liens created by the bonds is excessive; but that is purely a question of policy and concerns the legislature alone. So, also, the fact that objections to the proceedings must be made within thirty days is clearly one of policy for the legislature.

The only question which seems to us to require any consideration is the one which is raised as to the power of the legislature to delegate the right to enforce the payment of the assessments to the holders of the bonds. It is claimed

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on the part of the appellant that this delegation is in clear violation of § 12 of art. 11 of our constitution, which provides that the corporate authorities only shall have power to assess and collect taxes for municipal purposes.

In our opinion, the provisions of the act in question do not deprive the corporate authorities of their rights under this section. The questions of determining whether or not the improvement shall be made, and, if to be made, how it shall be paid for, and the proportion of payment to be made by each piece of property benefited, are all left to the corporate authorities, and the fact that the right to enforce the lien created by the act, in favor of the bonds issued in payment for the work, is given to holders of such bonds in no manner violates the constitutional provision. It can make no difference to the taxpayer whether the lien of the assessment is enforced by the city in its own name or by a holder of the bond in his name or in the name of the city. The objection of the appellant growing out of this provision, that thereunder separate suits can be instituted against each of the property holders in favor of each of the bond holders, seems to us to raise no question of the violation of the constitution, but only a question of policy properly addressed to the legislature. We are not satisfied that under the provisions of the statute it will not be competent for a court of equity to compel the lien created by all the bonds issued for the entire work to be foreclosed in one suit, and even if the interpretation contended for by the appellant is the true one, the legislation is simply oppressive, and not in violation of any constitutional right.

This is all we need to say to indicate our view of the case. One of the main questions involved was not discussed on the argument, and has not been by us, for the reason that it was determined adversely to the position which would necessarily have been taken by the appellant, in the case of *State v. Carson*, *ante*, p. 250.

It follows that we find no constitutional objection to the act, and that it is applicable to cities of the first class, and that the judgment of the lower court in so holding must be affirmed.

ANDERS, STILES and SCOTT, JJ., concur.

DUNBAR, C. J., not sitting.

[No. 820. Decided May 18, 1893.]

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E. J. SPOONER, *Appellant*, v. THE CITY OF SEATTLE *et al.*,
Respondents.

CERTIORARI—QUASHING WRIT—WHEN LIES—REVIEW OF STREET
ASSESSMENT—PROCEEDINGS.

Although a writ of *certiorari* has been granted in favor of plaintiff, it may, before compliance with its directions, be quashed on motion of defendants therefor.

While the statute does not fix the time within which a writ of *certiorari* should be applied for, it should be applied for within a reasonable time after the act complained of has been done, and two years is not a reasonable time.

Where the only method prescribed by a city charter for the collection of a street assessment is by foreclosure in a court of record, *certiorari* will not lie for the purpose of reviewing the assessment proceedings.

Appeal from Superior Court, King County.

Tustin, Gearin & Crews, for appellant.

George Donworth, and *James B. Howe*, for respondents.

The opinion of the court was delivered by

STILES, J.—The record in this case shows that the superior court of King county, after having granted a writ

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of *certiorari* in favor of the appellant and against the respondents, entertained a motion to quash the writ, which motion it permitted to be amended or supplemented by the allegation of additional grounds before the matter was finally disposed of. Upon the grounds thus presented, it quashed the writ. The motion to quash was substantially a demurrer to the petition. There seems to have been no logical reason why it should not have been entertained before the respondents had complied with its direction to certify a copy of the record. Such proceeding was clearly a proper one, upon every view of the system of pleading and practice in this state.

Two of the grounds urged upon the motion to quash, at least, were well taken—*First*: The petition was not filed until more than two years after the proceedings taken by the city to assess the property in question were completed. The writ of *certiorari* is in the nature of an appeal, and, while the statute does not fix the time within which the writ should be applied for, it should be applied for within a reasonable time after the act complained of has been done, and two years and upwards was not a reasonable time. *Second*: In our opinion, no writ of *certiorari* will lie in such a case like this. *Wilson v. Seattle*, 2 Wash. 543, (27 Pac. Rep. 474) is not in point. The proceedings on the part of the city consisted of certain steps taken to assess real estate for the improvement of a street under the special charter of the city of Seattle, enacted in 1886. By that charter the only method which the city had of collecting a street assessment was by foreclosure in a court of record. Whenever such a foreclosure is attempted by the city, the appellant will have full opportunity to defend against it. Under this state of the law, *certiorari* should not be resorted to in such a way as to make it substantially an action to remove a cloud from the title. Much of the

matter urged by appellant in his brief is entirely unfounded in anything discoverable in the record.

The judgment of the lower court is affirmed.

DUNBAR, C. J., and HOYT and ANDERS, JJ., concur.

SCOTT, J., concurs in the result.

[No. 939. Decided May 18, 1893.]

THE STATE OF WASHINGTON, *on the relation of the City of Seattle, Appellant*, v. D. R. ABRAHAM'S, *Respondent*.

TAXATION IN CITIES OF FIRST CLASS—ASSESSMENT BY COUNTY ASSESSOR.

The general revenue law adopted March 15, 1893, requiring that the names of persons to whom personal property is assessed shall be listed alphabetically in the roll, and that real estate shall be listed numerically, must be construed in connection with the provisions of the act of March 9, 1893, requiring assessors in counties containing cities of the first class to list the property within the limits of any such city in as compact a form as practicable on the assessment roll, and when, by reason of a change in the boundaries of any city, or otherwise, the rate of taxes is required to differ in different districts thereof, the assessor shall properly segregate the real and personal property in each district so that each rate of taxation may be readily applied to property lawfully coming thereunder; and for the purposes of city assessments, the making of separate lists for different districts, which shall themselves be arranged alphabetically, in the case of personal property, and numerically in the case of real property, will be a full compliance with the statute.

Appeal from Superior Court, King County.

George Donworth, and *James B. Howe*, for appellant.

A. G. McBride, for respondent.

The opinion of the court was delivered by

STILES, J.—It seems to us that the judgment of the court below in this case allows the assessor to substitute

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his own convenience in making up the assessment roll of King county in place of the express mandate of the law. This court held a few days since, in the case of *State v. Carson*, *ante*, p. 250, that the act of March 9, 1893 (Laws, p. 167), providing for the assessment and collection of taxes in cities of the first class, was constitutional, and was not repealed by the general revenue law of March 15th (Laws, p. 323). The first section of the former act required the assessors in counties containing cities of the first class to list the property within the limits of any such city, subject to taxes therein, in as compact a form as practicable, on the assessment roll. It was also provided that when, by reason of a change in the boundaries of any city, or otherwise, the rate of taxes is required to differ in different districts thereof, the assessor should properly segregate the real and personal property in each district, so that each rate of taxation might be readily applied to property lawfully coming thereunder. The admitted facts in this case are that the assessor of King county proposes to accomplish both requirements by merely writing or printing upon the face of the roll, opposite each description of property, whether real or personal, the name of the city of Seattle; and as there are two rates of taxation in different portions of the city, growing out of the fact that considerable additional territory has been added to the original city since certain indebtedness was incurred, the assessor will make the segregation of districts by using the letters "O. L." and "N. L.," standing for "old limits" and "new limits," opposite the several descriptions upon the roll. Opposed to this method, the city claims that the assessor in the case of real property, should entirely separate all of that contained in the old limits from the other real property in the county, and likewise that contained in the new limits, and place these two masses of property by themselves in his roll; and the same demand is made in

regard to taxes upon personal property which are assessed to individual owners by name. We think these demands are entirely just, and that in no other way will there be a compliance with the requirements of the statute. The only reason given for declining to follow this method, outside of that of the convenience of the officers, is that the general revenue law adopted March 15th requires, in general terms, that the names of persons to whom personal property is assessed shall be listed alphabetically in the roll, and that real estate shall be listed numerically. But these two statutes must be taken together in considering these latter provisions. An absolute alphabetical and numerical arrangement will not result if the work is done in the manner demanded by the city, it is true; but, in view of the existence of the law of March 9th, we must hold that an absolute adherence to the letter of the statute as to alphabetical and numerical arrangement is not required, but that the making of separate lists, which shall themselves be arranged alphabetically in the case of personal property, and numerically in the case of real property, will be a full compliance with the statute. The assessment blanks prepared by the county auditor, a copy of which has been presented in the case, seem to comply with the other requirements of the statute, and they can be used to carry out the segregation which we think should be made, as well as they could be if the assessor's plan were followed.

The gist of the whole contention between the assessor and the city is, that the assessor considers "designation" to be equivalent to "segregation;" but, whatever may be the meaning of the words in other cases, certainly the spirit of the act of March 9th would not be met by merely designating each tract as within or without the city of Seattle, with "O. L." or "N. L." added, as is here proposed. It is pointed out that the act of March 9th only requires that the segregation of the city property be such as to place it

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in as "compact a form as practicable," and that the assessor and his witnesses have shown that the arrangement proposed by the city is not the most practicable. The evidence only goes to show, however, that, while the city's method is entirely practicable, the assessor's method would be more easily followed, and would cost less, and that the business of collecting the taxes could be more easily done upon that kind of a roll, all of which amounts only to a showing of superior convenience to the officers and less expense. But, as to the expense, neither the officers nor the courts have anything to say; and, while convenience is worthy of consideration in such matters, it cannot be permitted to abrogate the statute. We interpret the provisions of the act of March 9th to mean that the legislature had in mind, first of all, the convenience and expense of the cities when it directed that the assessment rolls be prepared in a certain way; and certainly no more inconvenient scheme could be devised for determining the total of the taxable property in a city, and for checking up the payment of taxes levied thereon, than to scatter the descriptions throughout the entire county roll.

The judgment of the superior court is reversed, and the cause remanded, with instructions to make the writ of mandate peremptory.

HOYT, SCOTT and ANDERS, JJ., concur.

DUNBAR, C. J., not sitting.

[No. 832. Decided May 23, 1893.]

THE CITY OF SPOKANE, *Respondent*, v. FRANK WILLIAMS,
Appellant.

VAGRANCY—CONVICTION UNDER MUNICIPAL ORDINANCE.

Although a city may be authorized to punish, but not to define, the crime of "vagrancy," yet a conviction under an ordinance defining the crime and providing punishment therefor will be valid when the complaint states facts sufficient to constitute a crime under the statute defining vagrancy.

Appeal from Superior Court, Spokane County.

James L. Crotty, and Hyde, Glass & Reagan, for appellant.

P. Q. Rothrock, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—The appellant was convicted of violating an ordinance of the city of Spokane concerning vagrancy, and urges here that the city ordinance is unauthorized and void, because the city was only authorized by the legislature to punish vagrants, and not to define the crime of "vagrancy." The discussion of this question is not in point here, for in this case the complaint, which was brought under the provisions of the ordinance, states facts sufficient to constitute a crime under the general law defining "vagrancy."

The contention that the ordinance in question ceased to exist upon the 1st day of February, 1886, because the act by which the charter was amended went into effect on that day, is fully answered by § 93 of the amendatory act (Laws 1885-6, p. 323), which provides that "all valid ordinances of the city of Spokane Falls, when this act takes effect, . . . and until the same are repealed, and all

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rights vested and liabilities incurred when this act takes effect shall not thereby be lost, impaired or discharged.”

The testimony objected to, we think, was admissible.

Finding no error, the judgment is affirmed.

ANDERS, HOYT, STILES and SCOTT, JJ., concur.

[No. 885. Decided May 23, 1893.]

ALEXANDER W. CALDER, *Respondent*, v. THE CITY OF
WALLA WALLA, *Appellant*.

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NEGLIGENCE—ICY SIDEWALKS—LIABILITY OF CITY.

A city is not liable for damages for injuries received from falling on an icy sidewalk if the ice is not so rough and uneven, or so rounded up, or at such an incline as to make it an obstruction and to cause it to be unsafe for travel with the exercise of due care.

Where there is testimony tending to show that an accident was due to the slipperiness and smoothness caused by the ice upon a walk, it is error for the court to refuse to instruct the jury that “mere slipperiness of the sidewalk, occasioned by ice or snow, not being accumulated so as to cause an obstruction, is not ordinarily such a defect as will make the city liable for damages occasioned thereby.”

Appeal from Superior Court, Walla Walla County.

W. T. Dovell, and J. G. Thomas, for appellant.

The opinion of the court was delivered by

SCOTT, J.—Respondent brought an action against the city to recover damages for injuries caused him by falling upon a sidewalk, and, obtaining a judgment therefor, the city appealed. Certain questions are raised as to the refusal of the court to grant a motion for a non-suit, and to permit an ordinance to be introduced in evidence, and also

for refusing to give certain instructions requested by the defendant. No brief was filed by the respondent.

It is questionable whether enough appears from the testimony to show that the ice had accumulated to such an extent, or was in such a condition, as to render it an obstruction to travel. The city is not liable for accidents occasioned by mere slipperiness caused by ice upon the walk. If the ice is not so rough and uneven, or so rounded up, or at such an incline as to make it an obstruction, and to cause it to be unsafe for travel with the exercise of due care, there is no liability. *Henkes v. City of Minneapolis*, 42 Minn. 530 (44 N. W. Rep. 1026); *City of Chicago v. McGiven*, 78 Ill. 347; *Cook v. City of Milwaukee*, 24 Wis. 270; *Chase v. City of Cleveland*, 44 Ohio St. 505 (9 N. E. Rep. 225); *Broburg v. City of Des Moines*, 63 Iowa, 523 (19 N. W. Rep. 340). But the question as to the refusal of the court to grant the motion for a non-suit is unimportant now, for the case must be reversed on other grounds, and, if a new trial is had, the testimony may be more explicit as to some of the points involved.

Assuming that there was enough in the testimony of the plaintiff to show that the ice was so rough and uneven as to be an obstruction to travel, and to render it unsafe for a person to walk thereon exercising reasonable care, and that the accident was due to this, there was other testimony which showed that the accident was due to the slipperiness and smoothness caused by the ice upon the walk; and the defendant's first instruction, requesting the court to instruct the jury that "mere slipperiness of the sidewalk, occasioned by ice or snow, not being accumulated so as to cause an obstruction, is not ordinarily such a defect as will make the city liable for damages occasioned thereby," should have been given, there being testimony to found the same upon as aforesaid, and the legal proposition involved being well established, as shown by the authorities cited.

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The ordinance in question was one requiring persons occupying property abutting on streets where sidewalks were laid to keep the same clear from snow and ice, and in case of vacant lots such duty was imposed upon the owner. The defendant was entitled to have this ordinance admitted in evidence to show that it had provided a way for keeping the sidewalks clear from obstruction, and it was authorized to wait a reasonable time for the persons upon whom the duty was imposed to comply with the provisions of the ordinance. *Taylor v. City of Yonkers*, 105 N. Y. 202 (11 N. E. Rep. 642).

Judgment reversed.

DUNBAR, C. J., and HOYT, STILES and ANDERS, JJ., concur.

[No. 681. Decided May 24, 1893.]

THE CITY OF SEATTLE, *Appellant*, v. COLUMBIA & PUGET SOUND RAILROAD COMPANY, AND NORTHERN PACIFIC & PUGET SOUND SHORE RAILROAD COMPANY, *Respondents*.

MUNICIPAL CORPORATIONS—FRANCHISE FOR RIGHT-OF-WAY OVER STREETS—ESTOPPEL—CHANGE OF GRADE—PERPETUAL GRANT.

Where the city of Seattle has laid out a street over tide land, and granted a railway company the right to lay tracks thereon, by virtue of provisions contained in the charter conferred upon the city by the territorial legislature, and its acts in exercising such power have been subsequently confirmed by the provision of the state constitution authorizing cities to extend their streets over tide lands, such city is estopped to dispute the validity of the franchise granted the railway company, on the ground of want of authority in the city to grant the right-of-way.

Although an ordinance of a city granting a railway company a right-of-way over a certain street may impose a condition that the railway must be constructed within a certain time, yet the city is estopped to urge that the grant is void by reason of a failure to comply with such conditions, when the ordinance has never been

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repealed and the city has permitted the railway company to continuously operate its road for several years.

A municipal corporation has no right to make such a change in a street grade as will effect a destruction of the franchise theretofore granted a railway company to lay its tracks therein.

A municipal corporation may grant a perpetual franchise for a right-of-way over its streets.

Appeal from Superior Court, King County.

George Donaworth (*Burke, Shepard & Woods*, of counsel), for appellant.

Ashton & Chapman, and *Andrew F. Burleigh*, for respondents.

The opinion of the court was delivered by

SCOTT, J.—On the 14th day of March, 1882, the city of Seattle passed an ordinance purporting to grant a right-of-way to the Oregon & Transcontinental Railroad Company and the Columbia & Puget Sound Railroad Company to lay a single or double track along and upon certain streets therein described. The first section, describing the route, was amended October 29, 1883. The second section, omitting the seventh subdivision, which provided for the joint use of such tracks by any other railroad company constructing a railroad to Seattle, and provided a method of determining compensation therefor, is as follows:

“That said Oregon & Transcontinental Railroad Company and the Columbia & Puget Sound Railroad Company be and are authorized to locate, lay down, and perpetually maintain and operate a single or double track railroad upon the track and place described in section one of this ordinance, upon the following terms, to wit:

“*First*: That the said companies, their successors and assigns, are to allow each wharf owner a side track connecting the said road with the warehouses of each wharf owner, the side track to be constructed and kept in repair by the wharf owners or occupants along said water front.

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“*Second:* That the rights so granted shall not in any way be construed as depriving the occupants of lots along said water front of any riparian rights or any rights, except so far as such way extends. The said owners and occupants reserve the right to wharf out in front of said railroad, and it is agreed that they shall have that right without objection by, or on the part of, said railroad companies, their successors or assigns.

“*Third:* The said road to be constructed by the railroad companies so as to be on a common level with the wharves along said water front.

“*Fourth:* That said companies, their successors and assigns, where said track crosses a wharf now or hereafter to be constructed, shall plank and keep in repair at least fifteen feet of said way, and, whenever a double track is constructed over said way, then the company or companies constructing or operating the same shall plank and keep in repair the entire way over said wharves, and the same may be used by the wharf owners at all times except when trains are passing over it.

“*Fifth:* That said railroad companies, their successors and assigns, shall not allow their cars to stand upon the track on any wharf along said water front without the consent of the owner of such wharf.

“*Sixth:* That said Oregon & Transcontinental Railroad Company is to construct a standard gauge railroad from Seattle to a point on the Northern Pacific Railroad Company's constructed line, so as to connect the city of Seattle with Eastern Washington, either by way of Portland, Oregon, or the Cascade mountains, within two (2) years; and, on failure so to do, this right herein granted shall be void and of no effect: *Provided*, That, if any other road shall construct a standard gauge road connecting Seattle with Eastern Washington before the roads above mentioned, then and in such case the rights herein to lay, maintain and operate such tracks be, and the same are hereby, granted to the road that shall so construct such line.”

“*Eighth:* That said companies, their successors or assigns, shall not run trains over said tracks along said water front at a higher rate of speed than six miles an hour, and the city shall retain the same control over the streets and

alleys wherein the said tracks are laid [as] on and across streets and alleys upon the land.”

In the latter part of 1883, the Puget Sound Shore Railroad Company, which was the predecessor of the Northern Pacific & Puget Sound Shore Railroad Company, and which claimed to have succeeded to the rights of the Oregon & Transcontinental Railroad Company, aforesaid, constructed a railroad of standard gauge from Seattle to Stuck Junction, a point on the Northern Pacific Railroad Company's line, thereby connecting the city of Seattle with Eastern Washington, then via Portland, Oregon, with a continuous line of railroad. This road was constructed within the time specified. It started from a point within the southern limits of said city of Seattle, but did not cover any part of the right-of-way described in said ordinance. This road was operated for about one month after completion, but thenceforth for a year and a half no trains were run thereover. A three-rail track (the Columbia & Puget Sound Railroad being a narrow gauge road) was also constructed by the Columbia & Puget Sound Railroad Company and the Puget Sound Shore Railroad Company along the right-of-way described in said ordinance, which is now in controversy, but a gap of one rail's length was left at the point where the standard gauge track was designed to connect with the line constructed as aforesaid. After the expiration of this period of one year and a half, during which the road aforesaid was not operated, the connection was made, and a continuous line was thenceforth operated continuously for several years, until June 6, 1889, when a great fire destroyed the railroad on said right-of-way, together with a vast amount of other property in the vicinity. The railroad companies at once set about restoring the wharves and warehouses, etc., and the railroad tracks on said right-of-way. When they reached Columbia street, building north, they found that the city had raised the grade of

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that street at the point of crossing about two feet, and had filled in the street to conform therewith. On August 21, 1889, when the railroad companies were proceeding to build across the street on the wharf-level grade as before, and were cutting the embankment the city had placed in front of them, this action was commenced, and a temporary restraining order was issued and served, restraining them from prosecuting the reconstruction of their tracks across Columbia street. Various attempts were made to dissolve this order, but without success, so that the respondents have not been able to reconstruct said tracks north of the south line of Columbia street by reason of these proceedings. Upon the final trial, the court below decided the cause in favor of the defendants, but ordered that the respondents should gain no advantage of the decision, provided the city should, within thirty days, prosecute an appeal, which it has done. Therefore, all matters remain in *statu quo* as of August 21, 1889.

The right-of-way in controversy is located upon tide and shore lands, a part of it being within the meander line, and a part without. The first five propositions contended for by appellant relate to the right of the city to maintain and control a public street on the shore land prior to the erection of the Territory of Washington into a state, to extend the streets in question thereon, and to the enactment of the ordinance establishing the higher grade of Columbia street after the destruction of the railroad at such point by fire as aforesaid. For the purposes of this case, these propositions will be taken as established. The remaining points contended for by appellant are as follows:

“6. Ordinance No. 262 (as amended by ordinance No. 484), purporting to grant a franchise to build and operate a railroad, is void, by reason of the non-existence of the Oregon & Transcontinental Railroad Company, one of the grantees named—*First*, in respect to the defendant Columbia & Puget Sound Railroad Company, the other grantee;

and also, *second*, in respect to the defendant Puget Sound Shore Railroad Company, which joined with the last-named grantee in building the road; and, *third*, in respect to said defendants jointly; and, *fourth*, said franchise was also void because in terms perpetual and irrevocable.

“7. Said ordinance is void by reason of non-compliance with the sixth condition therein specified, as to the time within which the road should be constructed to a connection with Eastern Washington, and by reason of failure continuously to operate the road when constructed.

“8. Said ordinance was of no force in respect to the shore land, comprising the place to which the injunction sought relates, because the city, at the date of the ordinance, had no power to dispose of or incumber the shore; and the city is not estopped, by its subsequently acquired title to the *locus in quo* as a street, from denying its former power to make the grant.

“9. Assuming, however, that the defendants have the franchise claimed under the ordinance, the city’s right of control over the street at the point of crossing was paramount, and could be exercised, when the injunction was sought, as the city might see fit, though the result might be the impairment or even destruction of the defendants’ franchise; the sole remedy of the defendants, if any, being an action for damages.

“10. Even if the city’s right of control over the street could not be exercised to the destruction of the defendants’ franchise, its exercise in this case would not work a destruction of the franchise, apart from the change of grade of other streets crossing the railroad; and such change of other streets was not properly proved, and, if proved, was irrelevant under the pleadings.”

The order in which the points have been stated will not be followed in the discussion, but the proposition in relation to the want of authority in the city to grant the right-of-way in question, stated in its eighth ground, will be first noticed. The right to authorize railroad companies to lay their tracks upon the streets and public places in the city generally was expressly conferred by law. Section 11 of

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the charter of the city of Seattle, in force at the time, to be found at page 243 of the Session Laws of 1885-86, is as follows:

“The city of Seattle has power to provide for the survey of the blocks and streets of the city, and for making and establishing the boundary lines of such blocks and streets, and to establish the grades of all streets within the city, and to lay off, widen, straighten, narrow, change, extend, vacate and establish streets, highways, alleys and all public grounds, and to provide for the condemnation of such real estate as may be necessary for such purposes, and to levy and collect assessments upon all property benefited by any change or improvement authorized by this section, sufficient to make compensation for all property condemned or damaged; and to authorize or forbid the location and laying down of tracks for railways and street railways on any and all streets and alleys and public places within the city: *Provided*, That no street or alley shall be extended or vacated except by a vote of six members of the council in favor thereof: *And provided further*, That any person or corporation laying down such railway shall be liable to the owners of property abutting upon such streets, alley or alleys, for all damages or injury caused thereby, to be ascertained on the petition of the property owners, in the manner provided by chapter 188, §§ 2473 to 2576, inclusive, of the Code of Washington of 1881; and the judgment and decree thereon shall be that the company or persons shall pay such damages, and, on such payment, shall be entitled to such right-of-way, and, if no petition for such compensation shall be filed within two years after the track is so laid, such claim shall be barred.”

There are several sections contained in the Code of 1881 also relating to this subject matter, which are as follows:

“SEC. 2458. When it shall be necessary or convenient in the location of any road herein mentioned to appropriate any part of any public road, street or alley or public grounds, the county court of the county wherein such road, street, alley or public grounds may be, unless the same be within the corporate limits of a municipal corporation, is

authorized to agree with the corporation constructing the road, upon the extent, terms and conditions upon which the same may be appropriated or used and occupied by such corporation, and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient, in the location and construction of said road.

“SEC. 2459. Whenever a private corporation is authorized to appropriate any public highway or grounds, as mentioned in the last section, if the same be within the limits of any town, whether incorporated or not, such corporation shall locate their road upon such particular road, street or alley, or public grounds, within such town, as the local authorities mentioned in the last section, and having charge thereof, shall designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time, when requested, such corporation may make such appropriation without reference thereto.”

These are now §§ 1574 and 1575, vol. 1, of the present code.

While it is admitted that the city had the right generally to allow railroad companies to lay tracks upon its streets, it is contended that it had no such right where such streets were located upon tide lands, because the title thereto was in the territory in trust for the future state, and, therefore, that the city could not burden the same with any easement. It is contended, however, that the city had the right to occupy such lands for street purposes, and, although we have taken this contention as established, it may be well to notice some of the provisions of the city charter relating thereto. Section 11, as we have seen, confers power to lay off, establish and extend streets, etc., and establish the grades thereof. Section 26 confers power to build, construct and regulate wharves, piers and landing places at the foot of any street terminating at the shore of Elliott bay, and to regulate and prescribe the limits of the extension of wharves into the waters of any harbors within the

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city limits. And § 1 defines the limits of the city as extending on the westward to the center of Elliott bay. Thus it will be seen that the city had as full and complete rights in the premises as could have been granted by the territorial legislature, and this grant was valid and binding, excepting as against the future state, and until it should take some steps to annul such action, subject, of course, to such restraints as should be imposed by the general government in its control of such waters. The city's exercise of the power so granted by the territorial legislature was never interfered with in the premises, but its acts thereunder have been expressly confirmed by virtue of the grant of power in § 3, art. 15 of the state constitution, authorizing the city to extend its streets over intervening tide lands to the harbor area there provided for. We know of no reason why the city could not authorize the laying of railway tracks upon streets located upon tide and shore lands. We see nothing in the way of its granting whatever rights it did have in the premises. The very right to occupy shore and tide lands for street purposes would carry with it during such time at least the full enjoyment of all privileges that the city exercised with regard to its other streets, and one of these was the right to authorize the location of railway tracks upon its streets. This seems to us to have been as much within the policy of the law as was the recognition of the right to use such lands for street purposes in any wise. The city undertook to, and did, as far as it was able, confer this privilege on the respondents. Its acts have never been in any wise questioned, excepting in this instance, where it undertakes to set up its own want of power. But it sought to exercise the power, and its right so to do was not interfered with by any higher authority, but, on the contrary, was subsequently confirmed; and we are of the opinion that the city is in no position to urge the invalidity of the franchise, or its want of power

to grant the same, under the circumstances, nor can it arbitrarily repeal the same, whatever rights it may have in the exercise of the power of eminent domain.

We are also of the opinion that the city is not in a position to urge that the ordinance is void by reason of a noncompliance with the sixth condition as to the time within which the railroad should be constructed, nor of the failure to continuously operate the road when constructed. The essential object of the ordinance was to secure continuous railway connection with the eastern part of the state, and for that purpose the ordinance, by a proviso in said condition, purported to confer or convey the right to lay a track upon the right-of-way in question to any company which should first construct a standard gauge railroad affording such connection. There was no intention to limit the privileges authorized to the particular corporations named, and while it is admitted that the road was not constructed from the point in controversy within the time specified, and that for a year and a half from about a month after its completion it was not operated, and thus, as appellant contends, the spirit of the ordinance was violated, yet, notwithstanding this, the ordinance was not repealed, nor was any step taken during said time to compel the railroad companies to remove their tracks from the streets in question, but they were allowed to remain there, and finally the line was put in operation, and was operated continuously for several years prior to the institution of this suit. The respondents' rights in the premises were in no wise questioned during said times, and, conceding that the city had the right to impose the time limitation condition, we are of the opinion that it is now, and was at the time of the institution of this suit, estopped from availing itself of the same under the circumstances.

It seems to us that the contention of the respondents is well founded, that the ordinance in question, while it re-

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mained upon the books as one of the ordinances of said city, had the effect of designating the route where the line of railway might be constructed by any company choosing to build a standard gauge road thereon connecting said city by rail with Eastern Washington, and that, by constructing its line of railway thereon, respondents acquired a right as against the city to use such streets for such purpose, subject of course, to the reasonable control and regulation of the municipal authorities.

As to the sixth proposition: The point that there was no such corporation in existence as the Oregon & Transcontinental Railroad Company seems to us immaterial. It does appear that there was a corporation known as the "Oregon Transcontinental Company," and we think it fairly appears from the proof that this was the corporation that was intended to be designated, instead of the "Oregon & Transcontinental Railroad Company," which had no existence, and that it was, in effect, simply a misnomer; but, under the view we have taken of the points heretofore discussed, this matter becomes unimportant.

The point in relation to the franchise being void, because in terms perpetual and irrevocable, will be further noticed. What has been said disposes of the sixth, seventh and eighth propositions otherwise.

Many of appellant's statements advanced in support of its ninth ground are unquestionably sound, but they fail to sustain the position taken. A city's power to improve and graduate its streets is undoubtedly a continuant power, not exhausted by its first exercise, and inalienable by the corporate authorities, and such authorities are the ones to judge of the expediency or necessity of its exercise. This is well sustained by the cases cited. But the next statement, that under this power the city's right to establish and execute a new and higher grade of Columbia street at the place in dispute follows as a matter of course, must be

taken with some degree of limitation. It will aid in the discussion of this question to state our views here of the effect of the city's action in the premises. The raising of the grade of the railway tracks two feet at the point in question would greatly impair the usefulness of the tracks. This clearly appears from the proof, and it also appears that at the same time the city raised the grades of other streets in the vicinity which were crossed by the railroad tracks aforesaid to such an extent as to make it impossible for the railroad companies to reconstruct their tracks upon said right-of-way. The effect of the raising of the grades of these various streets was such as to absolutely destroy the franchise, let alone making it impossible for the railroad companies to comply with the ordinance in question, in giving to each wharf owner a side track, and to construct the tracks on a common level with the wharves along the water front. Under such a state of facts, we think the well settled rule of law is that the city's right to graduate its streets or alter the grades thereof is not an absolute one, to be exercised at its option, regardless of its effect upon others, but it is a power which must be reasonably exercised with reference to the rights of parties interested. It cannot be exercised to the extent of working a destruction of such a franchise previously granted. This would amount to an unauthorized taking of property; and none of the cases cited by appellant, in our opinion, support such contention, as none of them go to the extent of holding that the city may so alter and change the grades of its streets as to work a destruction of a valuable property under such circumstances, but the right to change the grades of streets is sustained upon the ground that the same may be done consistent with the preservation of rights previously acquired by others; as in the case of *State v. Mayor, etc., of Hoboken*, 41 N. J. Law, 71, which involved the validity of an ordinance requiring a horse railway to

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make its tracks previously laid conform to the grade of the street, in which case it is said that—

“The provisions in these ordinances, requiring the tracks to conform to grade, and to be laid under the direction of the street commissioner, . . . are of the character of regulations which may be adopted, and, if reasonable, are valid. Such regulations do not appreciably interfere with the exercise of its franchise by a corporation having a franchise to use the public streets for its business; . . . and the legislature is presumed to have intended, when it authorized the use of the public streets for such purposes, that its grantee should hold its privileges subject to such regulations as are reasonably necessary for the common use of the streets, for the purposes of a street railway, and for ordinary travel.”

Nor can we agree with the statement that there was in this case no taking of property by the alteration of such grades because, at the particular time the ordinances were passed, the railroad tracks had been destroyed by fire at the point in question, and, for that reason, there was no property there in existence to take. The argument might apply with some force in case of the destruction of a structure which could be rebuilt as well to conform to one grade as another, and where there would only be a damaging, instead of a deprivation, of the right. But the railroad tracks at this point must be rebuilt with reference to the established grade of the railroads of which they were a part. The part which merely crossed the street could not be segregated and looked at independently, for it was of no value, excepting as a part of the system, and could only be reconstructed practically upon the same grade as before; and this, as we have seen, was rendered impossible by the changes in the grades of the streets made as aforesaid. Although the railway tracks across this street were destroyed by fire, the property of the companies still remained. The property was the franchise—the right to use the street for

the purpose of constructing and operating tracks thereon. This was the material thing of value, and this was what was sought to be taken by the corporate authorities in the manner aforesaid, and it was just as much of a taking as though the tracks had been actually in existence at the time the ordinances were adopted. The property of railroad companies is as much within the protection of the law as that of any other company or of any individual. Railroads are recognized as essential to the welfare and prosperity of the people, and, because of their capacity for usefulness to the whole people, railroad companies are invested with large powers of a public nature. The laws of the state also provide for the organization of cities, and large powers are granted to them relating to the control and regulation of matters within the municipal limits; but, when a broad interpretation of such powers clashes with acquired property rights, as in this instance, such reasonable construction should be given them as shall not have the effect of destroying, or even materially injuring, such rights. The city must so use its powers as to enable the respondents to have a reasonable use and enjoyment of theirs, and not so as to render it impossible or even very difficult for the respondents to reconstruct and operate their railroads. 1 Rorer, Railroads, p. 553, par. 13. Property rights acquired under and by virtue of franchises thus granted are perpetual, unless otherwise limited in the grant; and there was no limit in this instance, and such franchises are not void in consequence thereof. There is no sound reason why a municipal corporation may not bind itself in this particular, as well as an individual may. On the contrary, well recognized principles of justice require that it should be so bound, to the end that property rights may be made stable and certain; and the municipality is sufficiently protected under such circumstances; for should it become necessary to thereafter undo the work, and terminate the rights granted,

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Syllabus.

and to take the property of the corporation acquired in pursuance and by virtue thereof, it may do so under the exercise of the power of eminent domain upon making compensation; and this is a sufficient protection for the rights of the city, and one which, at the same time, affords protection to the rights of the respondents. *State v. Noyes*, 47 Me. 189; *Port of Mobile v. Louisville, etc., R. R. Co.*, 84 Ala. 115 (4 South. Rep. 106).

The substance of the tenth point has been previously disposed of in the view taken that the acts of the city, if sustained, would work a destruction of the franchise. Minor points as to whether the proof was irrelevant under the pleadings are of no particular importance at this time. Where a full and fair trial has been had upon the merits, and this is apparent, little attention will be paid in an equity cause to technical points raised over the pleadings.

The judgment of the lower court is affirmed.

DUNBAR, C. J., and HOYT, STILES and ANDERS, JJ., concur.

[No. 506. Decided May 24, 1893.]

EVAN ENOCH, *Respondent*, v. THE SPOKANE FALLS AND NORTHERN RAILWAY COMPANY, *Appellant*.

APPROPRIATION OF PUBLIC LANDS—RIGHTS OF PRE-EMPTION
CLAIMANT—MEASURE OF DAMAGES—INSTRUCTIONS.

The rights of a preëmption claimant to public land of the United States are reserved by certain provisions of the act of congress of March 3, 1875, entitled "An act granting to railroads a right-of-way through the public lands of the United States;" and where a railroad appropriates public lands upon which a preëmption entry has been properly made prior to the filing of a profile of the road in the office of the secretary of the interior, the railroad is liable for damages.

Where the only objection to an instruction is that it is too general in its terms, the proper practice is to move to make it more specific.

6	393
6	623
33*	966
34*	151
6	393
21	94
21	335
6	393
30	255
31	19
31	457

Under the provisions of art. 1, § 16 of the constitution, the measure of damages, where land is appropriated by a railroad for right-of-way purposes, is the fair market value of the land taken at the time of the appropriation, together with the amount of depreciation, if any, in the value of the land not taken, and these respective amounts should be ascertained without regard to any benefits that may have resulted from the construction, or proposed construction, of the railroad. (*Northern, etc., R. R. Co. v. Coleman*, 3 Wash. 234, overruled.)

Appeal from Superior Court, Spokane County.

McBride & Allen, for appellant.

Ridpath & Marshall, for respondent.

The opinion of the court was delivered by

ANDERS, J.—On the 16th day of March, 1889, the respondent settled upon the northwest quarter of section 34, in township 29 north, range 42 east, W. M., and on the 18th day of March, 1889, he filed his declaratory statement in the United States land office at Spokane Falls, Washington, and thereby claimed the right to enter the said land under the provisions of the preemption laws of the United States. He built a house thereon, soon after his settlement, in which he resided continuously up to the time of the trial of this action, and cleared some fifteen or twenty acres of the land for cultivation. In June and July, 1889, the appellant constructed a railroad across these premises, and appropriated therefor a strip of land one hundred feet in width, extending from a point about ten rods west of the southeast corner to a point on the west line thereof about thirty-three rods south of the northwest corner.

The respondent brought this action to recover compensation for the damages alleged to have been sustained by the taking and appropriating of the right-of-way, and the digging of holes in and removing of earth from parts of the

land outside of the limits of the strip taken for the right-of-way. The appellant contends that the land claimed by the respondent was, at the time of the building of the railroad, public land of the United States, and that it was entitled to the right-of-way through the same by virtue of the provisions of the act of congress of March 3, 1875, entitled "An act granting to railroads a right-of-way through the public lands of the United States." Supp. Rev. St. U. S. (2d ed.) 91.

It is not shown by the record or claimed by the respondent that he had, prior to the construction of the railroad, or prior to the filing of the profile of appellant's road with the register of the land office at Spokane Falls, and the approval thereof by the secretary of the interior, paid for the land claimed by him. And this being so, it was within the power of congress under the rulings of the supreme court of the United States, to grant an absolute and unincumbered right-of-way through this land to the railroad company, or even to withdraw the land from the operation of the preëmption laws altogether, and to confer the right to purchase the same upon some other person. *Frisbie v. Whitney*, 9 Wall. 195; *Hutchings v. Low*, 15 Wall. 77.

These cases maintain the doctrine that the power of regulation and disposition over the public lands of the United States, conferred upon congress by the constitution, only ceases, under the preëmption laws, when all the preliminary acts prescribed by those laws for the acquisition, including the payment of the price of the land, have been performed by the settler, and that when these prerequisites have been complied with, the settler, for the first time, acquires a vested interest in the property occupied by him, of which he cannot subsequently be deprived. And the same view was expressed by the supreme court of California in *Hutton v. Frisbie*, 37 Cal. 475.

It seems to be conceded that the appellant has complied

with the conditions of the act of March 3, 1875, and is therefore entitled to all of the privileges and benefits thereby intended to be conferred on railroad companies. It was duly incorporated under the laws of the then Territory of Washington on the 17th day of April, 1888, and a copy of its articles of incorporation, together with proof of its organization, was filed in the office of the secretary of the interior on June 5, 1888. On November 21, 1889, it filed a duly verified profile of its road, as definitely located, with the register of the United States land office at Spokane Falls, and the same was approved by the secretary of the interior on December 14, 1889. The requirements of the law having been thus complied with, it is insisted on behalf of appellant—*First*, That the grant of the right-of-way took effect in its favor on June 5, 1888, when a copy of its articles of incorporation and proofs of organization were filed and approved by the secretary of the interior, which was long prior to the initiation of respondent's claim under the preëmption law, and was, therefore, not affected by such claim; and, *second*, That whether the grant became operative at that date or subsequently, still the respondent had no such an interest in the land occupied by him as entitled him to indemnity for the right-of-way appropriated by the appellant, for the alleged reason that the land was at the time public land of the United States, and therefore included in appellant's grant. On the other hand the respondent contends that the provisions of the act of congress under which the appellant claims did not inure to the benefit of appellant until it filed a profile of its road in the office of the secretary of the interior, and that it then only took effect as of that date; and, furthermore, that by the terms of said act the rights of preëmption and homestead claimants are recognized and reserved from the operation of the grant. We think the construction contended for by the respondent is the only

one warranted by a fair interpretation of all the provisions of the statute.

If the first section stood alone it would be difficult to escape the conclusion that it was the intention of congress that the grant therein mentioned should attach in favor of any railroad company immediately upon the filing of a copy of its articles of incorporation and proofs of organization as therein provided. But a consideration of subsequent sections leads us to the conclusion that such was not the intention of the framers of the act. By the fourth section it is provided "that any railroad company desiring to secure the benefits of this act shall within twelve months after the location of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the secretary of the interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such right-of-way shall pass shall be disposed of subject to such right-of-way." From this provision it would appear that no railroad company can claim to be a grantee of a right-of-way over the public lands until a profile of its road has been filed and approved as therein specified.

And after that has been done, the grant is not operative upon lands to which private rights have previously attached. This is the clear import of the language used in the third section, which provides the manner in which private lands and possessory claims on the public lands of the United States may be condemned. The respondent in this case was certainly a possessory claimant on the public lands of the United States, and the appellant had therefore no right to appropriate any portion of his "claim"

except upon payment of a just compensation, to be ascertained in the manner provided by law.

In *Red River, etc., R. R. Co., v. Sture*, 32 Minn. 95 (20 N. W. Rep. 229), the supreme court of Minnesota, speaking of this act of March 3, 1875, said:

“This is not in the nature of an absolute grant *in presenti* to a designated company, as in the case of *Railroad Co. v. Baldwin*, 103 U. S. 426, where it was held that, as soon as the route is definitely fixed, the title attaches from the date of the act. This act is in the nature of a general offer to the public, which takes effect and becomes operative as a grant to a particular company only when it accepts its terms by a compliance with the conditions precedent prescribed in the act itself. This proposition rests on elementary principles. A grant, like any other contract, must have two parties—a grantor and grantee—and an offer not accepted constitutes no contract. This is clearly the theory on which the act is framed. It merely offers or proposes to give any railroad company, upon compliance with its terms, the right-of-way over public lands to which private rights have not attached at or before the date of such compliance.”

Such is also the view of the supreme court of Oregon, as expressed in *Larsen v. O. R. & N. Co.*, 19 Or. 240 (23 Pac. Rep. 974). The court there stated, in construing this act, “it does not assume to grant the possessory claims of those who had acquired them prior to the time of compliance with the act by a railroad company claiming the benefit of the act, for the reason that the third section of the act provides for the condemnation of such possessory claims. This provision is a clear recognition of such claims as against any corporation claiming by title subsequent to their acquisition.” It is true that in both of the above cases the rights of a homestead claimant were involved, but we think the same rule must be held applicable as well to the possessory claims of those occupying lands under the provisions of the preëmption laws.

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At the trial of this cause the judge, among other instructions, charged the jury —

“That in estimating the damages, if any, which the jury may find from the evidence the plaintiff has sustained by reason of the acts of the defendant, the jury are to disregard any evidence which may have been delivered to them as to enhancement in value of the lands in question, and consider only the amount of damages, if any, plaintiff has suffered by reason of the acts of defendant set out in the complaint.”

The following instruction was also given to the jury:

“In estimating the damages which the plaintiff will be entitled to recover, if you find him entitled to recover anything, you must consider two elements of damages—*First*: The actual market value of the strip of land actually taken by the railroad company at the time it was taken, irrespective of any benefit from the proposed railroad.”

It is claimed by the learned counsel for the appellant that these instructions were erroneous for the reason that, as given, they permitted the jury to fix the value of the land, at the time the railroad was constructed over it, without deducting the amount which the land had been enhanced in value by reason of the construction of the proposed road. The last instruction above set forth is certainly unobjectionable, for it is in accordance with § 16, art. 1 of our state constitution, which provides that when private property is taken for a right-of-way by any corporation other than municipal, compensation shall be made as therein specified, “irrespective of any benefit from any improvement proposed by such corporation.” If the instruction was too general in its terms, it was the duty of the appellant to ask the court to make it more specific, instead of merely objecting to it in the form as given.

Nor do we think the first instruction given by the court is open to just criticism. If the court had permitted the jury in their estimation of damages to take into consideration the enhancement of the value of the lands in question,

it would have sanctioned an assessment which was not "irrespective of benefits," and hence, in contravention of the provision of the constitution above mentioned. Under any view that may be taken of this constitutional provision, benefits cannot be set off against damages resulting from appropriations for rights-of-way for railroads.

Under the constitution the land owner is entitled to full compensation, in money, for the injury sustained, and that provision precludes payment of any part of such compensation in benefits. But, in order that there might be no doubt upon this question, the framers of the section of the constitution under consideration further declared that such compensation should be ascertained irrespective of benefits. Does this phrase mean that the corporation making the appropriation may show that the value of the property, a part of which it takes for a right-of-way, has been enhanced by the construction or proposed construction of its road, and then deduct such enhancement from the present value of the land and only pay the remainder as damages? Or does it mean that a person whose land is taken for the use of a railroad is entitled to its fair market value without regard to the causes that may have contributed to make up such value? The latter is the construction given by the highest courts of several of the states whose constitutions contain a similar provision.

In *Giesy v. Vincinnati, etc., R. R. Co.*, 4 Ohio St. 308, which is a well considered case, it was held that the expression "irrespective of benefits," and the words "without deduction for benefits," both of which were used in the constitution of Ohio, were equivalent in meaning. And in speaking of the compensation to be paid for land condemned for railroad purposes, the court, by RANNEY, J., there said:

"The word 'irrespective' relates to this full compensation, and binds the jury to assess the amount, without look-

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ing at or regarding any benefits contemplated by the construction of the improvement. Where this is done and this consideration wholly excluded, the jury have nothing to do but ascertain the fair market value of the property taken; which is but saying that nothing shall be deducted from that value on account of such benefits. The opposite construction, so far from requiring the assessment to be made *irrespective* of these benefits, in effect compels the jury to ascertain their value to the property, and to deduct so much as they have increased it; thus using a word introduced for the sole benefit of the property holder in such manner as to deprive him of a portion of the acknowledged present value of his property, or to allow him to be paid for a part of its value in benefits; and, at the same time, fastens upon the constitution the gross inconsistency of allowing a corporation to procure the right-of-way upon easier terms than could be done by the public."

And in the same opinion the court further said:

"The jury are not required to consider how much, nor permitted to make any use of the fact that it may have increased in value by the proposal or construction of the work for which it is taken."

This construction of the constitution was adhered to in *Little Miami R. R. Co. v. Collett*, 6 Ohio St. 182, and in *Cincinnati, etc., Ry. Co. v. Longworth*, 30 Ohio St. 108. And a substantially similar view is held in *St. Louis, etc., R. R. v. Anderson*, 39 Ark. 167; in *Springfield, etc., Ry. v. Rhea*, 44 Ark. 258; in *St. Joseph, etc., R. R. Co. v. Orr*, 8 Kan. 419; in *Hunt v. Smith*, 9 Kan. 137; in *Reisner v. Union Depot & R. R. Co.*, 27 Kan. 382; and by the supreme court of Alabama and California. See *Alabama, etc., R. R. Co. v. Burkett*, 42 Ala. 83; *Pacific Coast Ry. Co. v. Porter*, 74 Cal. 261 (15 Pac. Rep. 774); *Muller v. Railway Co.*, 83 Cal. 240 (23 Pac. Rep. 265); *San Bernardino, etc., Ry. Co. v. Haven*, 94 Cal. 489 (29 Pac. Rep. 875).

And in the supreme court of Iowa, under a constitutional

provision that the jury "shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken," the point was made, in *Britton v. D. M., O. & S. R. Co.*, 59 Iowa, 540 (13 N. W. Rep. 710), that if the value of the land had been increased by the construction of the road, that should be considered and the damages reduced because of such fact, but the court held that all benefits and advantages were included in estimating the value, and none excluded.

We are not unmindful of the fact that this court laid down a different rule from that enunciated in the above decisions for the measure of damages, in cases like the one before us, in *Northern, etc., R. R. Co. v. Coleman*, 3 Wash. 234 (28 Pac. Rep. 514); but upon further reflection and from an examination of authorities which were not brought to our attention in that case, we have become satisfied that the equitable rule there adopted is at variance with the provisions of § 16 of art. 1 of our state constitution. That will, therefore, no longer be deemed an authoritative expression of the opinion of this court upon that question.

We think that the true measure of damages in such cases is the fair market value of the land taken at the time of the appropriation, together with the amount of depreciation, if any, in the value of the land not taken, and that these respective amounts should be ascertained irrespective of, that is, without regard to, any benefits that may have resulted from the construction or proposed construction of the railroad.

Perceiving no error in the record, the judgment of the court below must be affirmed, and it is so ordered.

DUNBAR, C. J., and HOYT, STILES and SCOTT, JJ., concur.

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Opinion of the Court—HOYT, J.

[No. 864. Decided May 24, 1893.]

SECOND NATIONAL BANK OF COLFAX, *Appellant*, v. T. S. ANGLIN, *Respondent*.

PROMISSORY NOTES—PROVISION FOR ATTORNEY FEES—EFFECT UPON NEGOTIABILITY.

A condition in a promissory note providing for the payment of attorney fees in the case of a suit to enforce its collection, does not affect the negotiability of the note.

Appeal from Superior Court, Whitman County.

Chadwick & Fullerton, for appellant.

The opinion of the court was delivered by

HOYT, J.—This action was brought to recover an amount alleged to be due upon a promissory note made by the respondent, which it was alleged had been endorsed by the payee to the plaintiff before maturity for a valuable consideration. Such note was substantially in the following form:

“Five months after date, without grace, for value received, I promise to pay to J. B. Standley, or order, at Colton, Wash. Ter’y, the sum of \$213.00 with interest thereon at the rate of $1\frac{1}{4}$ per cent. per month from maturity until paid. Principal and interest payable only in U. S. gold coin, and in the event of a suit to enforce the collection of this note or any portion thereof, I further agree to pay the additional sum of \$20.00 in like gold coin, as attorney’s fees in said suit.”

The rulings of the lower court during the progress of the trial were based entirely upon the theory that this note was not a negotiable one. Assuming that basis to be correct, it may be that such rulings could be sustained, although as to that question we now express no opinion. But it is clear that if that basis was not correct, such rul-

ings cannot be sustained and the judgment rendered in pursuance thereof must be reversed. The only question, therefore, which we shall consider it necessary to discuss is as to the negotiability of this note. It is claimed that the provision therein, for the payment of an attorney's fee in case of suit, has the effect to take from such note its negotiable character. Upon the question of negotiability of notes containing provisions similar to this one, there has been much controversy, and the decisions of the courts in reference thereto are totally irreconcilable. The only reason suggested why notes of this kind are not negotiable is, that by reason of such provision the amount thereof is made uncertain, and that as certainty in amount is one of the necessary conditions of negotiable paper, such uncertainty destroys such negotiability.

Upon principle we do not think that such a condition should be construed to have such an effect. Such clause has no relation to the amount stipulated to be paid in the note, if such payment is made in accordance with the terms thereof. It has absolutely no effect upon the amount which the holder may rightfully demand at the maturity of the note, nor upon the amount which it will be necessary for the maker thereof to tender at such maturity as a full discharge of his liability thereon. It is only upon the conditions of such note being broken and the promise to pay violated that this condition has any force whatever, and even then it has no force until an action has been brought to enforce the liability growing out of such violation of the conditions of the note. After maturity a note without any such condition loses the protection awarded to negotiable paper by the rules of the law merchant; therefore, such condition after it becomes effective does not materially change the rights and obligations of the parties interested in such note. It seems illogical to hold that the force of a positive promise to pay a definite sum at a defi-

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nite time shall be at all affected by a condition that in case of the violation of such promise a penalty may be imposed upon the promisor. The contingency that upon the violation of his promise the maker of a note may be called upon to pay an amount over and above that which he had promised to pay, ought not to have any effect upon such promise. We think it would be more logical to hold, if it was necessary so to do to preserve the integrity of the absolute promise contained in the note, that the additional sum to be paid upon the bringing of suit was an incident to the suit rather than to the note itself; that the condition should be held to be in the nature of a stipulation that the law as to costs of court should be deemed to be such that in that particular case it should include either the definite sum provided for as an attorney's fee, as in the note in question, or such a reasonable sum as the court might allow, as is often provided in notes of this kind.

The real object of such condition is to enable the holder of the note, if he is obliged to bring suit thereon, to recover such a sum by way of costs or attorney's fees as will reimburse him in whole or in part for the expenses which he may incur by reason of being compelled to go into court to collect such note. Such being the case, it seems to us that penalties of this kind may logically be considered as part of the costs incident to the action, and as being as far separated from the principal promise to pay contained in the note as are the costs which are allowed by the statute to the prevailing party. If the legislature should provide, that in all cases of suits upon promissory notes the prevailing party could recover, in addition to the other items of costs, such a sum as attorney's fees as the court should adjudge reasonable, it could not be successfully contended that such a provision would not have force, nor would it be held that by reason thereof the negotiable character had been taken from all notes coming within the terms thereof.

The reason why such legislation would have no effect upon the note itself would be because the costs allowed thereby were incident to the suit, and not to the contract for payment, and there would seem to be no logical reason why the stipulation of the parties that such items of costs might be taxed by the court should have any greater effect upon such promise to pay.

Costs of this kind are looked upon with disfavor by some of the courts, and nearly all reserve to themselves the right to control such costs, while few or none of them would think of controlling the effect of a direct promise to pay in the note itself. This tends to show that the courts have been disposed to look upon these costs not as an integral part of the promise to pay contained in the note, but rather as a stipulation for the payment of costs incident to a suit brought thereon. In our opinion, such costs when thus controlled by the courts should not be considered as unconscionable and oppressive. On the contrary, we think that the right to insert such provision in notes without, in any manner, affecting their character, when so controlled by the courts, will tend to the best interests of the borrowing classes. Those loaning money are usually in a condition to exact such terms from the borrower as they deem satisfactory, and if they are deprived of the right to stipulate for reimbursement for expenses incurred in case suit has to be brought upon the note, they will insist upon such additional rate of interest being provided for therein that the contingency of the outlay incident to a collection thereof by suit may be provided for. It will follow that everyone borrowing money will have to pay the increased rate of interest sufficient to meet such contingency, and this regardless of the fact that such contingency may never arise. One who loans money concludes that he will be satisfied with a certain rate of interest for the use of his money, and the risk incident to loaning it, and, if he can be assured

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of the repayment of the principal and such rate of interest, and, in the contingency that he has to incur expenses in the collection thereof, will be reimbursed therefor, he will be content to negotiate loans stipulating only for such rate of interest; but if he cannot be assured of such reimbursement of expenses he will be sure to protect himself by demanding an increased rate.

It follows that, upon principle, the provision under consideration should be held to have no effect upon the direct promise to pay contained in the note, and that notwithstanding such condition the paper should receive the protection of the rules of the law merchant. The authorities upon the subject, as we have already suggested, are inharmonious, and a very large array of cases could be cited to sustain the negotiability of notes of this kind, and substantially an equal array to establish the contrary doctrine. We shall not attempt any review of the cases upon either side, but shall content ourselves with a reference to a single case. In *Montgomery v. Crossthwait*, 90 Ala. 553 (8 South. Rep. 498), this question was directly decided by the supreme court of Alabama, and the judge who pronounced the opinion of the court entered upon the consideration of this question with a confessed bias in favor of the proposition that notes of this kind are not negotiable, but after, as he says, "a more careful investigation into the adjudged cases, and especially a more critical consideration of the reasons upon which the divergent conclusions of other courts are made to rest," he had become convinced that the rule that such notes are negotiable was the proper one. In the course of the opinion in this case a large number of authorities upon each side of the proposition are cited and commented upon, and the opinion gives evidence of a most careful examination of the question, and we are satisfied with the result thereof.

It follows that the note sued upon was, in our judgment,

negotiable, notwithstanding the condition for the payment of attorney's fees contained therein, and that in holding to the contrary, and for that reason excluding it from evidence, under the circumstances shown by the record, the lower court committed error for which its judgment must be reversed, and the cause remanded for a new trial.

DUNBAR, C. J., and ANDERS, SCOTT and STILES, JJ., concur.

[No. 917. Decided May 24, 1893.]

A. H. PORTER, *Appellant*, v. F. M. TULL, *Respondent*.

LANDLORD AND TENANT—DESTRUCTION OF PREMISES—RECOVERY OF RENT PAID IN ADVANCE.

Where a building, occupied by a tenant under a lease whereby he covenants to pay a certain rental per month in advance, is destroyed by fire, the tenant may recover the money paid in advance for that portion of the month remaining after the destruction of the premises.

Appeal from Superior Court, Spokane County.

Nash & Nash, for appellant.

Jones, Belt & Quinn, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—This is an action for the recovery of lease money paid in advance according to the terms of the lease. The respondent, F. M. Tull, the owner and lessor of the leased premises, rented and leased to A. H. Porter and C. F. Jackson certain rooms and portions of the building known as the Tull block, in the city of Spokane. The lessees paid the stipulated rent according to the terms of the lease, monthly in advance, including the month of Au-

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gust, 1889. On the 4th day of August, 1889, the building was destroyed by fire, and Porter for himself, and as the assignee of Jackson, brings this action to recover from Tull the money paid in advance for the remainder of the month of August, 1889.

It is contended by the appellant that the authorities in this country fully sustain the proposition that when there is a total destruction of the subject matter of the lease the rent shall be apportioned, and the tenant is no longer liable on his covenant. This proposition is conceded by the respondent so far as it applies to rent that is due for periods subsequent to the term for which the rent is paid in advance; but he insists that a distinction must be made here, and that inasmuch as the parties have contracted that the money must be paid in advance, it follows that they have apportioned the risk, or settled it between them; that the tenant assumes the risk of losing the rent for the time for which he has paid in advance; and the landlord assumes the risk of losing subsequent payments, besides the loss of his building.

We are unable to discover any real foundation in logic, law or justice for this distinction. The consideration, for which the lessee pays a monthly rent in advance, is not that he may be put in possession of the building for a day, or two days, or a week, but the real consideration is the use and possession of the building for a month. That is the valuable thing for which he contracts and for which he parts with his money; and there is an implied contract on the part of the lessor to furnish him the use of the building for the time for which he pays for it. It cannot be presumed that because a lessee pays in advance that he has in contemplation the fixing of a different degree of liability in case of the destruction of the leased premises by fire; neither is it so intended by the lessor. It is simply a prudential requirement on his part to secure the rent, and to

protect himself against the chances of losing it, and the inconvenience and trouble of collecting it. Conceding that the lessee is not liable for the destruction of the leased building for the remainder of the period for which the building was leased, there must be something more to warrant the presumption that the parties intended to establish a different degree of liability than the mere fact that the money was paid in advance. What difference can there be in principle, so far as fixing liability is concerned, whether the contract is to pay the rent monthly in advance or monthly at the end of the month?

Great stress is placed by respondent on the idea that the parties have made a positive contract, and that they are bound by its terms. The contract in one instance is as positive and binding as in the other, and the liability to pay at the end of the month is as much fixed by such contract as the liability to pay in advance is fixed by the contract, and the same reasoning that would prevent the recovery of the money paid in advance would compel the payment of the money under the other contract at the end of the month after the destruction of the building.

We are not cited to any adjudicated cases on this point. The reason probably is that no one has ever questioned the right of the lessee to recover money paid for that which he never received. We think the complaint states a good cause of action, and that the court erred in sustaining the demurrer. The judgment is reversed, and the cause remanded with instructions to overrule the demurrer, and to proceed in accordance with this opinion.

HOYT, ANDERS and SCOTT, JJ., concur.

STILES, J., dissents.

May, 1898.]

Opinion of the Court—HORT, J.

[No. 938. Decided May 24, 1893.]

THE STATE OF WASHINGTON, *on the relation of H. L. Votaw, Assignee, et al.*, v. EMMETT N. PARKER, *Judge of the Superior Court of Pierce County.*

APPEALABLE ORDER—APPOINTMENT OF ASSIGNEE BY COURT—
MANDAMUS.

An appeal will not lie from an order of the superior court appointing an assignee in place of the one appointed by the assignor in his deed of assignment for the benefit of creditors; and, under such circumstances, the superior court cannot be compelled by *mandamus* to fix the amount of the *supersedeas* bond for an appeal from such order.

(Original Application for Mandamus.)

Carroll & Carroll, and *H. M. Hagerman*, for relators.

Stevens, Seymour & Sharpstein, for respondent.

The opinion of the court was delivered by

HORT, J.—Relators sought to appeal from an order of the superior court appointing an assignee in place of the one named by the assignor in his deed of assignment, and asked the court to fix the amount of the *supersedeas* bond on such appeal. This the court refused to do, and this proceeding has been instituted to compel such action on the part of the court by *mandamus*. The general rule which requires superior courts to recognize attempted appeals, and do all things necessary to give full effect thereto, is well established by the authorities, and has been recognized and enforced by this court. There is, however, in proceedings by *mandamus* another rule of equally general application fully established by the authorities, and that is that the courts will not compel, by their order in such proceedings, the lower court to do a vain and useless thing. Applying this rule to the facts shown by the petition in

this case, and it will be seen that, if, as a matter of fact, in the opinion of this court, no appeal would lie from the order made by the superior court, we would not compel the court below to take any steps in furtherance of the attempted appeal therefrom. Such steps on the part of the lower court would be absolutely useless, if, in fact, there could be no appeal from the order which was sought to be reversed thereby. It will, therefore, become necessary for us to determine in this proceeding whether or not the order in question is one from which an appeal will lie. If it is not, then, under the rule above announced, it will follow that the application for *mandamus* to compel the court to take action in pursuance of the attempted appeal must be denied. Our constitution provides that an appeal will lie to this court from the superior court in all actions and proceedings. This provision has been interpreted both by the legislature and the courts to provide for appeals only from final judgments and orders in such actions and proceedings. It follows that if the order in question is a final one in any action or proceeding, an appeal therefrom will lie. What was the action or proceeding pending in the superior court? Substantially it was the surrender by the assignor of his property to his creditors, and everything required by the statute to be done by the superior court was incidental to the main object of the statute and of the assignor to secure the application of such property to the payment of his obligations to all of his creditors equally. Incidental to such main object the statute has provided for the choice of an assignee—*First*, By the assignor himself, and, *second*, by the creditors and the court. And such choice of assignee, whether made by the assignor himself or in any other manner, is simply an incident to the main object of the proceeding, and cannot, in our opinion, be held to be a separate proceeding within the meaning of our constitution, or the statute enacted in pursuance thereof, giving this

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court jurisdiction by appeal from all final orders entered therein.

It follows that under our interpretation of such constitutional and statutory provisions the order from which this appeal was sought to be taken was not one from which an appeal would lie. As we have before said, the appointment of the assignee is purely incidental to the proceeding, and it can make no material difference to the assignor, nor to the creditors, as to the person who should discharge the duties of such assignee, and therefore there is no reason whatever for holding that a question growing out of such appointment is so far a separate proceeding that final orders entered therein come within the statutory provision as to appeals. The assignor has surrendered his property to the jurisdiction of the court and his interest therein is terminated, excepting that he or any creditor would doubtless have the right to ask the court to prevent any improper conduct in relation thereto on the part of the assignee. Whether such assignee had been named by the assignor, or in some other manner, the assignor has no such interest in the determination of the question of his continuance in the position as gives him any standing to appeal from any order which the court may make in regard thereto. Such assignee is simply a trustee for the creditors and is subject to the orders of the court and to the provisions of the statute in discharging such trust, and has no direct personal interest in the subject thereof. It is conclusively presumed that for what he may do in connection therewith he will receive such payment as will justly compensate him for the services rendered, and no more. It follows that an appeal will not lie in his behalf.

Beside these reasons, founded directly upon the terms of the statute and the nature of the order, there are other reasons why such appeals should not be allowed. If so allowed, the orderly administration of such estates would be

greatly interfered with. In this case, from the facts shown by the record, it appears that the creditors and the court have for some reason found that the assignee named in the deed of assignment is not the one who should administer the trust, and if an appeal from the order designating some one to administer it in his stead is to be allowed, and upon such appeal the enforcement of such order be superseded, it will follow either that the administration of the estate must be suspended until the determination of the appeal, or that it must continue in the hands of the person whom the creditors and the court have for some reason decided not to be the one who should thus administer it. We have looked somewhat carefully into the authorities upon this subject, but have been unable to find a single case which would warrant us in holding that an appeal would lie from orders of this kind. The only case at all in point is one in the supreme court of the United States, in which it was held that an appeal would lie from an order fixing the compensation of a receiver, but this case does not seem to be at all decisive of the question at bar. There the receiver had a direct pecuniary interest in the subject matter of the order, and it was held that, in view of the fact that such receiverships frequently continued for years, public policy and justice demanded that orders made from time to time as to the compensation of such receivers for services rendered should be considered final orders. A further reason for holding that appeals in such cases should be allowed was, that no inconvenience could result therefrom as the administration of the trust would continue, and be unaffected thereby.

On the other hand we have examined numerous cases in which practically the question now under consideration was decided adversely to the contention of the relators. The cases of *Brigel v. Starbuck*, 34 Ohio St. 280, and *In re Graft et al.*, *Appeal of Bailey*, 146 Pa. St. 415 (23 Atl. Rep. 397).

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are directly in point, and seem to us to be decisive of this case. See, also, cases of *Lake v. King*, 16 Nev. 215; *State v. Judge of the Third District Court of New Orleans*, 6 La. An. 484, and *Middleton v. McCullough* (Ark.), 9 S. W. Rep. 844.

The petition for the writ of *mandamus* must be denied.

DUNBAR, C. J., and SCOTT, ANDERS and STILES, JJ.,
concur.

[No. 859. Decided May 26, 1893.]

J. F. WATT, *Respondent*, v. R. G. O'BRIEN, *Appellant*.

APPEAL—SETTLEMENT OF STATEMENT—DISQUALIFICATION OF
JUDGE.

Where the judge of the superior court who tried a case has ceased to hold office, an appellant should give notice of the settlement of a statement of facts before the superior court of the county in which the case was tried, and if, when the matter comes on to be heard, it is ascertained that the judge of said court is disqualified from acting in the matter, it should be continued until a judge qualified to act is present. (ANDERS, J., dissents.)

Appeal from Superior Court, Thurston County.

Phil. Skillman, for appellant.

Charles H. Ayer, for respondent.

The opinion of the court was delivered by

HOYT, J.—It is clear that under the settled rulings of this court the certificate to the statement of facts contained in this record is such that the respondent is entitled to have it stricken therefrom, and this is admitted by the appellant. He seeks, however, to avoid the force of such rule by showing that the judge, who was the successor of the one who

tried the case was, by reason of his connection therewith, disqualified to make any order therein, and that for that reason he could not give his notice of the settlement of the statement of facts before the court, from which it should follow that the judge who tried the case must be allowed to settle such statement, notwithstanding the fact that before the date fixed for such settlement he had ceased to be such judge.

We are unable to see that such contingency could at all affect the rule heretofore announced by this court. The jurisdiction of the superior court for Thurston county could in no manner depend upon the fact of the disqualification of a particular judge.

It follows that in this case the notice should have been that the statement of facts would be settled before the superior court for Thurston county, and if, when the matter came on to be heard, it was ascertained that the judge of said court was disqualified from acting in the matter, it would have to be continued until a judge qualified to act was present.

The statement must be stricken, and this having been done, it follows, under a universal course of decisions by this court, that the case is not here for any purpose, and that the appeal must be dismissed.

DUNBAR, C. J., and SCOTT and STILES, JJ., concur.

ANDERS, J., dissents.

[No. 947. Decided May 26, 1893.]

THE STATE OF WASHINGTON, *on the relation of J. S. Peterson*, v. THE SUPERIOR COURT OF MASON COUNTY.

ATTACHMENT—TRIAL OF TITLE—FAILURE OF SHERIFF TO FILE CLAIMANT'S AFFIDAVIT—JURISDICTION OF SUPERIOR COURT.

The failure of the sheriff to file with the clerk of the superior court the affidavit and bond delivered to him by a third person, who claims property seized by him under an attachment, will not deprive the court of the county in which the property was seized of jurisdiction to adjudicate the title to the property.

Original Application for Prohibition.

Fred H. Peterson, for relator.

W. W. Likens, for respondent.

The opinion of the court was delivered by

STILES, J.—This is the same matter in connection with which this court heretofore prohibited the superior court of Pierce county from trying the question of title to the property seized under writ of attachment. *State v. Superior Court of Pierce Co.*, 5 Wash. 639 (32 Pac. Rep. 553). The petitioner now seeks to have the superior court of Mason county prohibited from trying the question of title upon the affidavit delivered by him to the sheriff of Mason county, on the ground that the affidavit was not filed by the sheriff with the clerk of the superior court of Mason county, and that court has lost jurisdiction of the case. While the statute directs the sheriff to file the affidavit, and that the cause be placed upon the trial docket of the court, we see no reason why the failure of the sheriff to perform his official duty should now deprive the attaching creditors of their right to have the title adjudicated.

The petition is, therefore, denied.

DUNBAR, C. J., and HOYT, SCOTT and ANDERS, JJ., concur.

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[No. 888. Decided May 27, 1903.]

DAVID MURRAY, *Respondent*, v. W. H. PETERSON, C. LONG-
MIRE AND H. M. BRYANT, *Appellants*.

NEGOTIABLE INSTRUMENTS—SPOILIATION—PLEADING.

A material alteration will not invalidate a written instrument when made by a stranger to the contract.

Where a promissory note has been changed by altering the provision for attorney's fee from 5 to 15 per cent., and a complaint is founded upon the note as originally executed, to which defendants answer, alleging the change made in the note without their knowledge or consent, a reply which admits the change as alleged, but avers that the note was not changed by plaintiff or by his authority, and that said alteration was made without his authority, knowledge or consent, is equivalent to pleading spoliation of the instrument by a stranger.

Appeal from Superior Court, Kittitas County.

Frost & Warner, for appellants.

Frank H. Rudkin, and *A. Mires*, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—This is an action upon a promissory note wherein there had been an original provision for an attorney's fee of five per cent. upon the amount due upon said note in case suit should be instituted to collect the same. Prior to the commencement of the action, plaintiff conceded that the provision for an attorney's fee of five per cent. had been changed to fifteen per cent. by writing a figure 1 immediately before the figure 5. In the first complaint the note was declared upon in its changed form. By permission of the court an amended complaint was filed which described the note as originally executed, and demand was made for judgment in the amount of the note, and for an attorney's fee of five per cent. of that amount. To this complaint the defendants answered, alleging the

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change in the note, and denying that it was their contract. The language of the answer concerning the change in the note is as follows:

“Said promissory note was, without the authority, knowledge or consent of the defendants, or either of them, altered in this:” (Here follows description of the alteration.)

To this affirmative defense plaintiff replied as follows:

“Plaintiff admits that the promissory note on which said action was brought was changed as in said answer stated, but avers that said promissory was not changed by him or by his authority, but that said change and alteration was made without his authority, knowledge or consent.”

Also alleged that when the first complaint was filed he had no knowledge or information that the note had been altered or changed, and averred that he had no knowledge or information as to when or by whom said note was altered and changed. The defendants moved for judgment on the pleadings, which motion the court overruled. The case went to trial, and a verdict was rendered and judgment entered for the plaintiff in accordance with his prayer.

There is no question in this case of any presumption as to whether the alteration was made before or after delivery, for it is admitted that it was made after delivery. Nor do we understand that the rule is contended for by the appellants that a material alteration made in a written instrument, whether by a party or a stranger, avoids the instrument. At all events the whole trend of modern authority is opposed to this rule, for while there is no doubt that a willful and material alteration of a written instrument made by one of the parties to it, and without the authority of the other party, defeats any rights he would otherwise have under it, the rule that an alteration, although material, cannot invalidate a written instrument when made by a stranger to the contract is just as thor-

oughly established. See 1 Am. & Eng. Enc. Law, p. 505, and cases cited.

And this, in our opinion, is a just rule, for while it is true that a party who has the custody of a written instrument should be held to a reasonably strict care of it, and care should be taken to prevent him from declaring on an altered instrument, and then simply curing it if the fraud be discovered, yet more abuses, in our judgment, would occur if, by the spoliation of an instrument by a stranger, the party entitled to it should thereby be deprived of his relief. So that we take it the material and practical question in this case is, does the reply of the plaintiff allege the spoliation? We think it does. At all events his reply is as definite as the affirmative allegations of the answer, and about as definite as it could have been made without knowledge of the manner in which the alteration was made. The answer does not specifically charge the plaintiff with making the alteration, and there is no more presumption from the allegation that he did it than that a stranger did. Presumptions of fact sometimes follow undisputed allegations, but the allegation itself must be definite. The reply does deny specifically that the change was made by plaintiff, or by his authority, and states affirmatively that it was made without his knowledge or consent, and fully excuses a more definite allegation by alleging that he has no knowledge or information as to when or by whom said note was altered and changed. If this allegation were true, it is all that he could plead, and the least liberality of construction would hold it equivalent to pleading a spoliation of the instrument.

We find no error in the record, and the judgment is therefore, affirmed.

ANDERS, HOYT and SCOTT, JJ., concur.

STILES, J., dissents.

May, 1893.]

Opinion of the Court—HOYT, J.

[No. 792. Decided May 31, 1893.]

ROCKFORD SHOE COMPANY, *Respondent*, v. A. J. JACOB,
Appellant.

PLEADING — ESTOPPEL — PREMATURE ACTION — DISMISSAL.

Plaintiff, on the 25th day of February, 1892, brought an action for goods sold and delivered defendant, alleging that the price became due on the 1st of February, 1892. Defendant answered that by the terms of credit given to defendant the price became due April 1, 1892. The plaintiff replied, admitting that it extended "the time for payment to April 1, 1892, making the same due and payable at said time." *Held*, That, the plaintiff having admitted the extension of time of payment in its pleading, it is estopped to say that such extension was void for want of consideration, and defendant is entitled to judgment of dismissal on the pleadings, on the ground that the action was prematurely brought.

Appeal from Superior Court, Pierce County.

Stevens, Seymour & Sharpstein, for appellant.

Shank, Murray & Dresbach, for respondent.

The opinion of the court was delivered by

HOYT, J.—The judgment against defendant in this case was rendered upon motion of the plaintiff upon the pleadings, and the only question raised by the appeal of the defendant is, as to whether or not the pleadings warranted the construction placed upon them by the court in its determination that upon the undisputed allegations contained therein the plaintiff was entitled to recover. The action was brought for goods sold and delivered, and it was alleged in the complaint that the amount to be paid therefor became due on the 1st of February, 1892. The action was commenced on the 25th day of February, 1892. Defendant, in his answer, after making certain denials, made an affirmative allegation as follows:

"And defendant, further answering, alleges that at the time of the commencement of this action there was no sum

6,421
10,308
33*1057
38*1116

whatever due and payable by defendant to the plaintiff. That defendant had, prior to the commencement of this action, bought certain goods of plaintiff, which, by the terms and credit given to defendant, became due and payable on or about the 1st day of April, 1892, and not before that time, and that the goods so purchased by defendant were the only goods purchased by defendant of plaintiff for which plaintiff has not been fully paid, and were, as defendant is informed and verily believes and alleges, the same goods described or attempted to be described in the complaint in this action.”

To this affirmative matter the plaintiff replied as follows:

“That plaintiffs admit that they extended the time for the payment of the said goods to April 1, 1892, making the same due and payable at said time. Wherefore plaintiffs pray for judgment against defendant in the sum named in complaint, and that the costs of this action be taxed to plaintiffs.”

The contention of the appellant is, that upon this affirmative allegation in his answer, and the admission in the reply of plaintiff, it must be held that at the time of the commencement of the suit there was nothing due from him to the plaintiff, and that he should have had judgment of dismissal, and for his costs against the plaintiff. The respondent contends that it not being alleged in said affirmative defense that the time of payment for the goods as therein alleged was postponed until the first of April at the time of the purchase, nor upon sufficient consideration at any time thereafter, it was insufficient to meet the allegations of the complaint, and that by admitting the truth thereof in its reply it only admitted it for what it was worth, and that, for the reason that it did not appear on the face thereof that the extension of credit was for a consideration, it was worth nothing.

We are unable to agree with this contention on the part of the respondent. It is true that the affirmative allegation in the answer is not as definite as it might have been.

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Opinion of the Court — HORT, J.

and a motion to make the same more definite and certain would have probably been granted; but instead of making such motion the plaintiff not only admits the truth of the allegation as pleaded, but expressly admits that the time of payment was extended until April 1st, and that the same was due and payable at said time. Having done this it cannot now be heard to say that such extension was void for want of consideration. To allow such a practice would be to encourage the setting of a trap by one party to unwarily catch the other upon some pure technicality. When plaintiff, in such general terms, itself admitted and alleged that it had extended the time for the payment of said goods to April 1, 1892, it must be presumed as against it that such extension was upon sufficient consideration. It follows that upon the pleadings as they stood the defendant, and not the plaintiff, was entitled to a judgment.

Respondent, however, suggests that the court erred in dissolving the attachment which was issued at the time the suit was commenced, and that we should now review its action in that regard, and if we find that the attachment should have been sustained we will allow it to stand, thus furnishing a basis for sustaining the suit upon the demand, although not due at the time the action was commenced. But, in view of the fact that the plaintiff has in no manner appealed from the decision of the court dissolving said attachment, we think that that question is not before us. It certainly would not be a proper practice upon the appeal of a defendant in a law case to review decisions of the lower court made in the progress of the case in his favor, and to which he had preserved no exception. It follows that the judgment cannot be allowed to stand, and that the defendant is entitled to have the action dismissed as having been prematurely brought. However, that the rights of the plaintiff may not be barred, such dismissal must be upon

the ground that the amount sued for was not due, and must be without prejudice to the bringing of another action.

The judgment will be reversed, and the cause remanded with instructions to enter a judgment of dismissal in favor of the defendant and against the plaintiff, as above suggested.

DUNBAR, C. J., and STILES, SCOTT and ANDERS, JJ.,
concur.

[No. 848. Decided May 31, 1893.]

JACOB BERNHARD, *Respondent*, v. CHARLES S. REEVES,
Appellant.

NEGLIGENCE—DEFECTIVE WATER CLOSET—PLEADING—INSTRUCTIONS—DISMISSAL OF ACTION.

In an action for damages caused by the leakage of water from a water closet, where, under the pleadings, no question is raised as to the manner in which the plumbing had been originally done, nor as to the make or construction of the water closet, it is prejudicial error to charge the jury that, unless the best kind of closet known at the time was placed in the building by the defendant, the jury may from that fact alone find him guilty of negligence.

Where, under all the evidence, it appears that the defendant was entitled to have the jury instructed to find a verdict in his favor, the supreme court will, on reversal of the judgment on appeal, direct a dismissal of the action.

Appeal from Superior Court, Pierce County.

Best & Munn, for appellant.

Doolittle & Fogg, and *Charles O. Bates*, for respondent.

The opinion of the court was delivered by

Hoyt, J.—During the progress of the trial of this case a wide range of testimony was allowed to be introduced,

6	424
428	715
128	716
6	424
40	230
6	424
41	550

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Opinion of the Court — HORT, J.

and in the instructions given to the jury the court attempted to cover the questions of law properly to be submitted to the jury upon the testimony thus introduced, without in any way limiting such instructions to the issues made by the pleadings. Under such pleadings there was no question whatever raised as to the manner in which the plumbing had been originally done, nor as to the make or construction of the water closet. The only allegation in plaintiff's complaint in regard thereto was that such closet was out of repair. Not only was there no attempt to allege any fault in the original construction, but, inferentially, there was an assertion that it was originally what it should have been, by the statement in the complaint that connections with the water pipes were made in the usual manner. This allegation, in connection with the further one that the closet was out of repair, certainly could not furnish any foundation for proof that the closet was not of the proper make, or was in any manner in its original construction defective. The court, however, instructed the jury that, unless the best kind of closet known at the time was placed in the building by the defendant, the jury might from that fact alone find him guilty of negligence. This instruction would have been too broad if within the issues made by the pleadings, and, as the jury may have founded their verdict upon this particular instruction, the appellant would have been entitled to a reversal; and for the greater reason was the giving of such instruction prejudicial error when we take into consideration the fact that, under the pleadings, neither the court nor jury had anything to do with the character or kind of closet placed in the building.

Appellant, however, is not content to take simply a judgment of reversal. He claims that, under all the proof in the case, he was entitled to have the jury instructed to find a verdict for the defendant, and that even if it be held that, when he went into his defense, he waived his motion for a

non-suit, made at the termination of the plaintiff's case, still he is entitled to the benefit thereof if, when the evidence was closed, the proof, taken as a whole, did not make a *prima facie* case for the plaintiff. We agree with this contention, and it therefore becomes necessary for us to consider whether or not there was sufficient proof of any fact which would have constituted negligence on the part of the defendant to have entitled the determination of such fact to be submitted to the jury. We have carefully examined all the proof offered, and are unable to find any sufficient proof of the negligence of the defendant to establish a *prima facie* case. There is substantially no proof of anything tending in the most remote degree to show negligence on the part of the defendant, excepting the fact that on the occasion which formed the foundation of the complaint, and upon two other occasions, there had been leakage from this closet. But we are unable to see how these facts alone tended to show negligence on the part of the defendant, when the fact is assumed, as it must be under these pleadings, that the closet was of an approved make, and properly placed in the building. Such proof, at most, could only show that at these particular times the closet was out of repair; and, in view of the evidence as to how these leakages may occur, it is doubtful whether the simple fact of such leakage was sufficient to show that fact. But, assuming that it was, there is nothing whatever to show that the defendant did not give it such attention and care as was reasonable under all the circumstances of the case, or that he knowingly allowed it to be out of repair for a single moment. We are not prepared to hold, as suggested by the respondent, that, in the ordinary use for domestic purposes of such a necessity as water, such use is of such a dangerous nature that if injury is occasioned thereby, it will be presumed to have been occasioned by the negligence of the user. On the contrary, we think that a com-

June, 1898.]

Syllabus.

mon and ordinary usage of such a necessary element is a strictly lawful one, and the usual rule as to such matters will obtain, and the negligence resulting from injury have to be proven as a part of the plaintiff's case when he seeks to recover damages therefor. But, even if such rule was applied to the facts in this case, it is doubtful whether or not the evidence was such that there was any question to submit to the jury. Taking all the testimony together, it appears that the defendant was not guilty of any negligence. On the contrary, it affirmatively appears therefrom that he had used ordinary care in attending to and managing the closet in question. It follows that the defendant was entitled to have had the jury instructed to find a verdict in his favor; and, as for that reason there should be no new trial, the judgment will be reversed, and the cause remanded, with instructions to dismiss the action.

SCOTT, ANDERS and STILES, JJ., concur.

DUNBAR, C. J., dissents.

[No. 953. Decided June 2, 1893.]

EDMUND SEYMOUR, *Respondent*, v. THE CITY OF TACOMA,
HERBERT S. HUSON, SAMUEL C. SLAUGHTER, GEORGE
W. BOGGS, JOHN T. LEE, AND THE TACOMA LIGHT AND
WATER COMPANY, *Appellants*.

MUNICIPAL CORPORATIONS—PURCHASE OF WATER WORKS—ISSU-
ANCE OF BONDS—NOTICE OF ELECTION—LIMITATION OF IN-
DEBTEDNESS.

Where there has been a substantial compliance with the requirements of the law governing notice of elections, in the matter of voting municipal bonds, and there has been a fair election thereunder, the result cannot be defeated by technical irregularities, such as posting the notice only twenty-six days instead of thirty, and failure to publish the notice in the official paper on the day imme-

6	427
7	73
7	191
33*	1050
34*	560
34*	915
6	427
12	366
13	143
13	154
13	513
6	427
16	389
6	427
129	410

diately preceding the election, when the ordinance required publication for the thirty days next preceding election day.

Under the charter of the city of Tacoma the assessment for purposes of taxation is not complete when the board of equalization has finished its labors in fixing and equalizing values, but the assessments, as equalized, must be added up on the rolls by the comptroller, and the same delivered by him to the city council before the assessment can be used as a basis for computing the limitation on municipal indebtedness. (DUNBAR, C. J., dissents.)

An election for the issuance of bonds for the purchase of water works is not void for the reason that at the same election there was also submitted another proposition for the issuance of bonds for the construction of a bridge.

Where, subsequent to a municipal election for voting bonds for the purchase of water works, but prior to their issuance, a new assessment becomes operative, whereby the valuation of taxable property is reduced, the city may be enjoined from issuing bonds in excess of five per cent. of the existing valuation, although, under the valuation in force at the time of the election, the city could lawfully vote for a larger issue.

Under the act of 1891, the limitation upon municipal indebtedness for water works, light plants and sewers is five per cent. of the total valuation of property within the city limits. (*Metcalfe v. Seattle*, 1 Wash. 297, distinguished.)

Where municipal bonds are not payable out of the general fund, but out of the proceeds of special taxes, the amount of cash in the general fund cannot be credited upon the amount of bonded indebtedness proposed so as to reduce the municipal indebtedness below the five per cent. limit.

Appeal from Superior Court, Pierce County.

Parsons, Corell & Parsons, and *F. H. Murray*, for appellants.

A. E. Buell, for respondent.

The opinion of the court was delivered by

STILES, J.—The election sought to be enjoined in the former case of *Seymour v. Tacoma*, ante, p. 138, having been held, and it having resulted in a legal majority in favor of the proposition then submitted, the same plaintiff

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now seeks to enjoin the issuance of the bonds authorized by this second suit against the city and the officers who constitute the sinking fund commission or finance committee of the city under its charter, they being charged with the duty of negotiating all such issues of bonds. The Tacoma Light and Water Company is also made a defendant, because of a claim alleged to be made upon its part that it has a binding contract for the sale of its plant through its offer to sell, the passage of the ordinance No. 790, and the result of the election.

The last clause of section 9 of the ordinance mentioned directed the city clerk to publish the election notice in the city official newspaper for "thirty days *next preceding* said election," and to post the same "for the like period" at all of the places designated as voting places. The election was noticed for, and was held on Tuesday the 11th day of April, and the complaint shows that, in fact, the notice was published in the official newspaper from March 11 to April 9, inclusive, a full period of thirty days; but it was not published in said paper on April 10, which was Monday, and the last day preceding the election. The complaint does not so state, but we shall assume that the official newspaper was a daily paper, which was issued on Monday. The complaint further shows that the notices were posted only *twenty-six* days next preceding the day of election.

These two omissions, it is claimed, and the trial court has so found, invalidate the election, and render it proper and legally necessary that no further steps be taken toward carrying out the object of the vote, notwithstanding that the complaint shows that more than three-fifths of the votes cast were in favor of the proposition submitted, but does not contain a single word to the effect that in any respect the election was otherwise than a fair, full and free expression of the popular will. But there was no formal

objection to the complaint, and the answer coming in a demurrer was interposed to it on the ground of insufficiency, and this demurrer the court sustained. The answer, in response to the allegations of the complaint upon the subject of the notice, was very full and direct, and showed the following facts: (1) That the time and places of holding the election were known to all the qualified voters in said city; (2) that the election was held at all of the voting places in the city in pursuance of the notice given by the clerk; and (3) that 5,107 votes were polled. The substance of this showing was that everybody qualified to vote had notice of the time and place of the election, and that a substantial body of the electors actually took part in it. Therefore, in passing upon this question, we have the single proposition whether the failure of the clerk to exactly comply with two requirements made by the ordinance, viz., that the publication should be for the thirty days next preceding election day, and that the notice should be posted, should avoid the popular action expressed under the supposition that all things had been done regularly.

This election was held under the mandate of the constitution, art. 8, § 6, and the internal improvement act of 1890, § 2 (Laws 1889-90, p. 521), the former of which prescribed nothing in regard to notice, while the latter requires thirty days' publication of the notice in each issue of the city paper. It seems that the court below based its ruling on this point somewhat, at least, upon the ground that this action is brought against the members of the sinking fund commission, who are to act under and by virtue of the authority contained in ordinance 790. It is true that the city charter (§ 84) provides that this commission shall negotiate city bonds in accordance with the provisions of the ordinance authorizing such bonds, and § 5 of the ordinance contained directions for their guidance in that matter; but the commission under the charter have nothing

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to do with either the election or the ascertainment of the result. They do not even issue the bonds, that duty devolving upon the mayor, with the attestation of the clerk and comptroller. The city council, by § 23 *et seq.* of the charter, makes the official canvass of all elections and declares the result, so that the commission need look no further for *prima facie* authority to act.

But it would do no good to decide this case upon any such narrow ground. The bottom question is, Is literal compliance with the formalities prescribed for giving notice in this kind of an election a *sine qua non*? Certain rules as to notice of elections have become well settled, and none of them are better settled than that the formalities of giving notice, although prescribed by statute, are directory merely, unless there is a declaration that unless the formalities are observed the election shall be void.

“It is a canon of election law that an election is not to be set aside for a mere informality or irregularity which cannot be said in any manner to have affected the result of the election.” Dillon, Mun. Corp., § 197, n. 3, and cases cited.

It is not pretended that the omissions in this case had any effect whatever on the result, or that a single vote additional would have been cast if the clerk had followed the ordinance to the letter; and the answer expressly negatives any possibility of any such outcome, which the demurrer admits to be true. Learned counsel for the respondent, however, does not controvert the general proposition here laid down, but insists that because this was an election to authorize bonds a rule of strict construction should be adopted. But we think that the most that can be said of it is that it was a special election, and is to be governed by the rules applicable to special elections. Only one case is cited for our consideration on this point—*Harding v. Rockford, etc., R. R. Co.*, 65 Ill. 90. That was a railroad aid

bond case, and the statute required thirty days' notice, but no notice whatever was given. The opinion of the court stated the ground of the decision as follows:

"Such municipalities were not created with the view to engage in commerce, or to aid in the construction of railways, but for governmental purposes only. When they exercise the functions given by the statutes under consideration, the powers granted must not only be clearly conferred but strictly pursued. If the mode prescribed for carrying into effect the right to issue bonds is not complied with *in all material matters*, then the bonds should not be issued."

In a later case, *Jacksonville, etc., R. R. Co. v. Town of Virden*, 104 Ill. 339, the same court in speaking of the rights of bondholders said:

"That depends upon whether there has in fact been a *substantial compliance* with the requirements of the law authorizing the election to be held, otherwise it would be in the power of the clerk to invalidate bonds clearly legal and binding, by refusing to make a record that the order was made or notice given."

In *Town of Coloma v. Eaves*, 92 U. S. 484, a case of the same class, the opinion recites the provisions of the statute at length, and dismisses them with the remark that "most of these provisions are merely directory." The substance of all the cases upon this subject, of which we have examined many scores, is that there must be a substantial compliance with the requirements of the law, and the same rule should apply here although the object sought to be accomplished here was strictly within the legitimate purposes of the municipal corporation. The reasons for the holdings of the courts on this subject are that only jurisdictional matters are mandatory. *Dishon v. Smith*, 10 Iowa, 212, is an oft-quoted case upon this point, and it was there said:

"It is an error to regard this as a jurisdictional matter. This idea pertains to cases where the court acts judicially

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and in matters between party and party, and not to one of the nature of the present one, which is a vote of the people. Nor does the want of such notice invalidate the election. In matters of such a public nature the observance of each particular is not held a prerequisite to validity. And it is the general rule of law, that statutes directing the mode of proceeding of public officers, relating to time and manner, are directory."

That was a case of a special election to remove a county seat. Rev. Stat. Iowa, 1860, § 231. As to special elections to fill vacancies in offices, see *Wheat v. Smith*, 50 Ark. 266 (7 S. W. Rep. 161), where it was held that a statute requiring publication and posting of notice was substantially complied with by posting only, the fact of the election having been generally known, and about two-thirds of the usual vote having been polled. In the matter of the incorporation of Anacortes the United States circuit court of this district held that the omission from the election notice of the number of inhabitants residing within the boundaries of the proposed corporation was an immaterial irregularity, although the statute required that the notice contain it. *Smith v. Commissioners*, 45 Fed. Rep. 725.

The power was conferred upon the city to issue these bonds by the statute, with the limitation that a vote of the people should first be taken to see whether they consented; and, they having consented, no mere negligence of the clerk or the publisher should be allowed to defeat their will. In this connection, however, we would not have it understood otherwise than that officers ought, in all such matters, to follow the letter of the law governing them, whether they deem any particular requirement material or not. Our holding is, only, that where, as in this case, there was a substantial compliance with the law, and there was a fair election, the result cannot be defeated by technical irregularities.

The second point in the case, upon which the court below

also ruled against the appellants, grows out of the fact that the election was not held a few days earlier. The amount of the proposed bonds does not exceed five per cent. of the city assessment for the year 1892; but, under the charter of the city of Tacoma, the beginning of the assessment year is January 1st. The assessor is required to make up and deliver to the city clerk an assessment roll of city property on or before March 1st. On the first Monday in March the board of equalization, which is a committee of the council, commences its sessions, and sits three weeks; within three days after the board of equalization finishes its business, the city clerk, who is *ex officio* clerk of this board, must deliver the roll to the comptroller (who is *ex officio* assessor), who must add up the columns of valuation and enter the total valuation of each description of property in the roll, and the total value of all the property assessed and listed thereon, and, thus equalized and added up, deliver the roll to the city council. At the first regular meeting of the council in May, or as soon thereafter as practicable, it must levy the annual taxes. Now, on the 11th day of April, when this election was held, the assessment roll had been made up containing some two hundred thousand different items; the board of equalization had finished its sessions March 27; the clerk had delivered the roll, with the changes made by the board to the comptroller; and the comptroller was proceeding to make the footings required by the charter, prior to delivering the roll to the council, which he did, so that the tax was levied May 13. When this roll came to be footed it was found that the assessed value of all the property upon it was \$41,608,050, five per cent. of which is \$2,080,402.50, or \$69,597.50 less than the amount of the proposed bonds, and the trial court held with the respondent that, under the act of 1890, the city was limited in its power to issue bonds for water works and a lighting plant to five per

cent. of the roll of 1893, rather than of the roll of 1892; that the roll of 1893 was complete on the 27th of March, when the board of equalization finished its work; and that it was incompetent for the city to take a vote on the 11th day of April to issue more than \$2,080,402.50 worth of bonds.

The argument in support of this proposition is that, although there had been no official ascertainment of the total amount of the taxable property in the city, it was at all times after March 27th possible for anyone, by adding up the columns of figures in the fourteen volumes of the roll, to ascertain the total to a mathematical certainty. In short, the maxim "*id certum est, quod certum reddi potest*" is applied to the case, and, although it is not contended that at the date of the election anybody knew what the total was, an estoppel by relation is held to render the election void. But we believe that upon examination it will be found that the ancient and most valuable maxim above quoted, was invented for the interpretation of deeds and written instruments, with a view of sustaining them against an otherwise probable failure, and can have no just application here. Broom, Legal Maxims, 622. If the "assessment" mentioned by the constitution, art. 8, § 6, and the "assessment roll" intended by the act of 1891 (Laws, p. 326), amending the act of 1890 (which must necessarily be the same thing), mean merely the itemized list of property, with values opposite, as it comes from the hands of the board of equalization, then very good; that is the end of it, and there is no need of applying maxims. The application of the maxim, and its possible adaptedness, do not prove that the thing to which it is applied is what is meant by the law.

Parenthetically it was said above that the "assessment" of the constitution and the "assessment roll" of the statute must be the same thing, and it is true; because the

legislature has no power to make the test of a bond issue depend upon anything else than the "assessment" named in the constitution. Now, a great deal is said in the constitution about the indebtedness of municipal corporations, including counties, towns and school districts, and the validity of all their debts is made absolutely contingent upon their being kept within the limits prescribed, all of which are measured by the "last assessment." And this "assessment" must refer to the actual aggregate of all taxable property to be sometime and somehow ascertained from year to year; and the word that was used was taken in view of the universal fact that periodically, under some law, all of these corporations take an account of their property for purposes of taxation, which is commonly called an assessment. All taxes, however, are levied upon totals, no account being taken of separate parcels, and the levies are made by percentages. As a general rule tax laws require some one to officially foot up and certify the total of the rolls, and our statute did this at the time of the adoption of the constitution (Code of 1881, § 2883), and all subsequent revenue laws have required the same thing, the auditor being the officer upon whom that duty devolved. And so in this city charter, the comptroller is the officer whose footing the council must have before them when they make the tax levy.

We think the constitution had fully in view this customary official ascertainment of the taxable property in a municipal corporation when it was adopted. The indebtedness of counties, cities and school districts being entirely dependent for its validity upon its not exceeding the limits prescribed, several things must have been regarded—(1) The safety of public securities. (2) The necessity that such corporations often have for borrowing money. (3) The rule that negotiable securities of this kind cannot be issued without express statutory authority. (4) The com-

pulsion that such corporations are under to know the limit of their right to incur indebtedness, and the like burden which is thrown upon buyers of their bonds to know that no statutory or constitutional condition precedent has been violated. (5) The fact that such a corporation is liable to be obliged to resort to bonding at any time. (6) The further fact that to authorize and negotiate an issue of bonds necessarily consumes several months. All of these considerations point to the conclusion that the idea of some definite time and method of ascertaining the aggregate of taxable property, that is, the "assessment," must have been implied in the constitutional provisions. But how is it here? These fourteen volumes, containing thousands of pages of unfooted columns, still in the hands of officers who are working upon them, furnished no information. A taxpayer might, while they were in this condition, have the right to inspect them to see how much he or his property was assessed, but he would have no right whatever to demand possession of them, or any of them, for the purpose of adding up the assessments. In a limited sense they were records, but they were not such *public* records as would answer the demand of any one seeking to know what the debt capacity of the city of Tacoma was, for until May 13th they did not bear upon their face what the charter required, viz., the footings and totals ascertained by the comptroller. Respondent says that he had no difficulty in finding out what the total was on May 11th, and he alleged the total, and it is not denied in the answer. It may be so; the total may have been known in the comptroller's office before that date. But it is not alleged or contended that the total was spread upon the record, and that the completed assessment was delivered to the council then, much less April 11th, a month before. In such case, how was any one to know after March 27th, when it is agreed that the board of equalization finished its work upon the

itemized values, what the assessment of taxable property in Tacoma was for 1893 until the complete assessment was delivered to the council? In this we speak of a practical knowledge which all persons alike were free to obtain. And how, then, could the affairs of such a corporation be run even from day to day, if there be a period of a month or more every year when nobody can know whether the contracts of a city or a county are valid or utterly void? For this ruling concerns not only bonded indebtedness but the ordinary indebtedness within one and one-half per cent. of the taxable property. It is no strange thing at all for a city to approach very near to its $1\frac{1}{2}$ per cent. limit and remain there for months; and, under a well-ordered system, the books should be in such condition that at the close of business every day the exact amount of liabilities should be known to a cent. But it is proposed to take one or two months in every year—whatever period is necessary to get the books in shape for the levy of taxes after the assessments have been equalized—and say that during that period there shall be no guide or certain reliance for the transaction of public business; or at most only the unofficial *dictum* of some one who may have run hastily over hundreds of thousands of figures. It cannot be conceded that the constitution intended any such thing. It is not reasonable, and what is not reasonable, in the absence of positive enactment, is not law. The appellants would have us hold that the assessment is not ascertained until, under this charter, the taxes are extended and the rolls delivered to the treasurer for collection; but logically we think that should not be the construction. When the total assessment has been officially ascertained and deposited where the law says it must be, viz., with the council, it becomes an open, authentic book, upon which all may rely with the certainty which the law contemplates; and from that time it should be regarded by the agents of the city.

We hold, therefore, that the election was valid, upon the points presented.

The complaint contained a claim that the election was void, because, at the same election, and by the same ballot, certain bonds for a bridge were voted. But the purpose for which these bonds are to be issued is one not within the provisions of the act of 1890, and the only point made is that two such diverse propositions could not be submitted at the same election. The superior court did not rule upon this, and we do not think it should be sustained.

But we must sustain the injunction as to all that portion of these bonds which exceeds five per cent. of the new assessment, viz., \$69,597.50, or rather seventy thousand dollars, as they are required to be of the denomination of one thousand dollars each, until the taxable value of the city's property reaches an amount sufficient to justify the issuance of this excess. The language of the statute requires this. The authority conferred by the act is, upon receiving the assent of the voters, "to become indebted and issue bonds:" *Provided*, That the indebtedness shall not exceed five per cent. A contract entered into before the new assessment became operative might have been enforced to the full extent of the authority afterward, and bonds to meet it might be issued; but here there is no contract, at least for more than the cost of the old works, and it is now proposed to make the only contract for the excess of \$400,000 by the bonds themselves. In the meantime, the new assessment, always a condition subsequent, has interposed and reduced the constitutional amount. It may be said that this will overturn the estimate made by the council for the cost of extensions, and that the result of the election might have been different if it had been known that the means available would be so much lessened. But it was not implied by any of these proceedings that the city was obliged to expend the full amount of the estimate.

nor that the whole or any part of it should be expended at once; nor, indeed, would there seem to be any compulsion to exercise upon the city, which, by its council, may determine to do nothing, at least so long as the bonds are not sold. That body will have to be the judge whether, with the reduced sum immediately available, it will go on with the scheme. So far as the law of the case on respondent's side is concerned it is the same as if, upon calling for bids, none were received for more than a portion of the issue. He could not interfere to prevent the sale of those bid for.

Appellant asks the construction that indebtedness for water works, light plants and sewers is not limited to five per cent. of the assessment, but may be of any percentage so long as the total of indebtedness for all purposes does not exceed ten per cent. We held that in *Metcalfe v. Seattle*, 1 Wash. 297 (25 Pac. Rep. 1010); but that was before the amendment of 1891, which, we think, clearly restricted such indebtedness to five per cent. only. Nor can we take into account the fact that the general fund in the city treasury contains \$148,000. These bonds are not payable out of the general fund, but out of special taxes to be levied for the purpose. Act of 1890, § 4.

Judgment reversed, with directions to enter a new judgment in accordance with this opinion, in case no issue of fact is taken upon the answer.

HOYT, ANDERS and SCOTT, JJ., concur.

DUNBAR, C. J. (*dissenting*).—I am unable to agree with the construction placed upon the law governing this case by my associates. This court in my judgment has already gone to the extreme limit of liberality in construing constitutional checks upon municipal indebtedness, and, I, as one member of the court, cannot see my way clear to go beyond that limit, which I think the court is compelled to do

June, 1893.] Dissenting Opinion — DUNBAR, C. J.

to sustain this transaction. The assessment was as complete upon the 27th day of March as it could have been made; the property of the city had been assessed; the value had been ascertained and stated by the assessor; that value and the actual amount of the assessment had been made fixed and certain by the action of the board of equalization. It could not be changed. It was an official statement of the value of the property of the city. The footing up and totalizing could add nothing to it, and could take nothing from it. That is simply a clerical exhibit of a fact already in existence. It is the *fact* which the constitution deals with, not the mere clerical ascertainment or publication of that fact in any particular method. Such a detail is not worthy of constitutional consideration, and in my judgment never was considered by the framers of the fundamental law. I am not at all disturbed by the fear that "there may be a month or more in each year when nobody can know whether contracts of a city or county are valid or wholly void." The energetic desire of cities in this state to incur indebtedness will easily overcome all such trifling obstacles as the ascertainment of the total footing of the assessment roll.

I think the judgment of the court should be affirmed.

[No. 782. Decided June 3, 1893.]

JOHN Y. ARNOTT AND CHARLES FERGUSON, *Respondents*,
v. THE CITY OF SPOKANE, *Appellant*.

MUNICIPAL CORPORATIONS—ILLEGAL CONTRACTS—RATIFICATION
—DISCOUNTING WARRANTS—BREACH OF CONTRACT—MEASURE
OF DAMAGES.

Where the charter of a city provides against liability on any contract for the payment of any sum exceeding fifty dollars, unless the same is authorized by ordinance and made in writing and signed by the clerk or an authorized agent, the city cannot be rendered liable by the verbal agreement of the mayor and a council committee to pay certain sums exceeding fifty dollars, in addition to those duly authorized by the council; nor can the city, by its conduct, acquiesce in and ratify the acts of its officers, so as to make such verbal contract valid and binding retroactively.

A municipal corporation has no authority to make a contract to discount its own warrants; and the fact that the city has paid a portion of the discount on its warrants in accordance with an agreement of its officers, will not estop it from asserting the illegality of such a contract.

Where there is a breach of a contract to pay cash when due for certain work, the only damages recoverable, when the injured party proceeds with the work to completion, is interest on the money from the time of the default.

Wherever a person enters into a contract with an agent of a municipal corporation, he must at his peril ascertain the extent of such agent's authority, and, if he fails to do so, he alone must suffer the consequences.

Appeal from Superior Court, Spokane County.

P. F. Quinn, for appellant.

Feighan, Wells & Herman, for respondents.

The opinion of the court was delivered by

ANDERS, J.—On the 17th day of November, 1890, the respondents and the appellant entered into a written contract, the material portion of which is as follows:

6 447
7 577
35*1063
35* 416
6 442
d11 45
33*1063
39* 267
6 442
15 262
6 442
18 639
6 442
22 345
6 442
23 591
6 442
31 280
6 442
34 428
6 442
40 300
40 548

June, 1893.] Opinion of the Court—ANDERS, J.

"This agreement, made this 17th day of November, A. D. 1890, between John Y. Arnott and Charles Ferguson and . . . , copartners, doing business under the firm name of John Y. Arnott & Company, of Spokane county, State of Washington, party of the first part, and the city of Spokane Falls, by C. F. Clough, mayor, party of the second part, witnesseth that the said party of the first part, in consideration of the covenants on the part of the said party of the second part hereinafter contained, hereby covenants with the said party of the second part that the said party of the first part will furnish the stone required for the Monroe street bridge piers, according to the plans and specifications, cut and delivered upon the ground where needed, according to the plans and specifications, ready to be set in place; a part of the rock to be delivered within sixty days, and completed within sixty days. Said stone shall be as per sample furnished the city council this 15th day of November, free from loose seams or imperfections of any kind, and subject to the inspection and acceptance of the city engineer. All stone must be dressed so that their top surfaces shall be parallel with their beds, and require no tooling after the stones are set. All coping stones shall be cut according to the plans furnished by the engineer, and shall have all exposed surfaces bush hammered, and comply with all other requirements of the engineer, as set forth in the plans and specifications now on file in the city clerk's office, which are hereby made a part of this contract, as far as said specifications refer to the stone to be used in the piers of said Monroe street bridge. And the said city of Spokane Falls, party of the second part, in consideration of the covenants on the part of the said party of the first part hereinbefore contained, agrees to and with the said party of the first part that the said party of the second part will pay to the said party of the first part, or his order, \$1.32 for each and every cubic foot of cut stone so delivered, to be measured in the pier, according to the approximate estimate made on Monday of each week of material delivered prior thereto. Said estimates to be made by the city engineer, and to be paid in cash immediately after said estimates have been reported to the city council, which is to be done at the next meeting after said estimates. In witness whereof," etc.

Immediately upon the execution of this contract, the respondents commenced to furnish stone, and to cut the same, and continued so to do without interruption or delay until some time in January, 1891. Estimates were made and given to the respondents for material furnished for the first four weeks, and cash payments were made thereon according to the stipulations of the contract. But, after the fourth estimate, the appellant failed to make payment on estimates when due. Work was continued after default in payments for about two weeks, and then discontinued or "shut down" by the respondents. This was about the 10th of January, 1891, and the suspension of work was continued for about the period of fourteen days. During this time no stonecutters were at work, but the respondents continued to receive stone at their yard from the party or parties who had contracted to deliver it to them, and employed laborers to assist in unloading the same. On or about January 10, 1891, a verbal arrangement was made between the respondents and the bridge committee and mayor of the city whereby the respondents agreed thereafter to take city warrants, which were selling at a discount, in lieu of cash, at the rate of 90 per cent. of their par value; and the bridge committee and mayor promised that the appellant would pay respondents the discount of 10 per cent. in cash on all warrants so received by them. The respondents thereupon resumed cutting and delivering stone, for which weekly estimates were made, and warrants were given in payment thereof in "blocks" of \$500 each. Some time in February the respondents again suspended work, for the alleged reason that they could not sell their warrants, and were without the means wherewith to pay their employes; but, about a month afterwards, they proceeded with their work, and completed it about the 1st of May, 1891.

It seems to be fairly deducible from the evidence that

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the respondents, before they resumed work after their first "shut down," notified the bridge and street committee and the acting mayor that they would hold the city liable for all extra cost of labor and transportation resulting from the failure to pay cash according to the terms of the contract, and the consequent suspension of their work, and that the committee and mayor tacitly, if not directly, agreed that the city would be responsible for the same. The respondents furnished, at the request of the city engineer, 332 feet of rock, which does not appear to have been called for by the original contract, but which was used in constructing the piers. They also cut down one pier some four inches, which work was occasioned by a mistake in the original specifications. Before the work was completed the roads became very muddy, and the respondents claim they were compelled to pay a much larger sum for hauling rock thereafter than before, and that, by reason of their not being able to finish their work within the sixty days specified in the contract, owing to the fault of the appellant in not paying the weekly estimates in cash, they were obliged to dress a considerable portion of the stone after it had become affected by frost to such an extent that the cost of cutting was enhanced about 50 per cent. They also claim that, by reason of the accumulation of stone during the time work was first suspended, a portion of it was necessarily deposited and dressed outside of the shed prepared for the cutters to work in, and that they were compelled to pay the extra sum of 50 cents per day to each laborer who worked outside of the shed. The total estimates furnished to the respondents (including \$320 for a derrick sold to the appellant, and, as it appears, the extra stone furnished at the original contract price) amounted to \$26,974.40. The respondents admit in their testimony that they received in cash and warrants reckoned at their face value that sum, less \$62. About \$20,000 in warrants was received

from the city altogether, and the city claims that \$1,100 cash, as discount, was received by respondents in accordance with the verbal agreement above mentioned, while the respondents claim that but \$850 was so received by them. After the respondents delivered all the stone required by the terms of their agreement, they presented to the city a claim for extra work and materials, and for damages for breach of their contract, and also for a balance due, amounting in all to between \$5,000 and \$6,000. The city council refused to allow the claim, or any part thereof, whereupon the respondents instituted this action to recover the amount thereof. From a judgment in favor of the plaintiffs, the defendant appealed.

During the course of the trial, the court admitted certain testimony tending to show the verbal agreement above mentioned in regard to the payment of extra cost of labor, transportation of materials, etc., and also testimony as to the agreement to discount the warrants of the city. The appellant insists that the ruling of the court in this regard was erroneous, and contrary to the express terms of the statute. Sec. 85 of the charter of the city, which was then in force, provides that—

“The city of Spokane Falls is not bound by any contract or in any way liable thereon, unless the same is authorized by a city ordinance, and made in writing and, by order of the council, signed by the clerk or some other person authorized by the city; but an ordinance or resolution may authorize any officer or agent of the city, naming him, to bind the city without a contract in writing for the payment of any sum not exceeding fifty dollars.” Laws 1885-6, p. 321.

The contention of the appellant is, that neither the bridge committee nor the mayor had any right or power to bind the city by any agreement or contract not made in writing, and signed by some person duly authorized to execute it. Upon this point we have no doubt of the correctness of ap-

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pellant's position. While a municipal corporation would, unless restricted by law, have a right to make contracts in reference to its corporate business in any manner it might deem proper, yet, where the mode of contracting is expressly provided by law, no other mode can be adopted which will bind the corporation. This principle results from the fact that municipal corporations derive all their powers from their charters. 1 Dill. Mun. Corp. (4th ed.) 449 (373); *Zottman v. San Francisco*, 20 Cal. 97; *McCoy v. Briant*, 53 Cal. 247; *McDonald v. Mayor*, 68 N. Y. 23; *Bladen v. Philadelphia*, 60 Pa. St. 464; *Allen v. Galveston*, 51 Tex. 302; *City of Bryan v. Page*, 51 Tex. 532; *Head v. Providence Insurance Co.*, 2 Cranch, 150. In the case last cited, Chief Justice MARSHALL, in speaking of the subject, said:

“The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and, when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated.”

In fact, so far as we have observed, the authorities are practically uniform on this question. Nor do the respondents appear to seriously dispute this proposition of law, but they contend that the city, by its conduct, acquiesced in and ratified the acts of its officers. The argument is that the city might have originally made the same agreement that its officers made, and hence had the power to ratify it, and must be held to have done so in this instance. But the difficulty arises, not from a want of power in the city to make contracts, but from the restriction imposed upon it by the legislature with reference to the mode of exercising such power. The power to ratify a particular contract presupposes the power to make it in the first instance; and, if it is such that it could not be made origi-

nally except in a certain prescribed mode, where that mode is disregarded the power to ratify does not exist. A contract which is invalid because not authorized by law cannot be made valid and binding retroactively by any subsequent action of the corporate body, and a liability be thereby fastened upon the corporation. *Zottman v. San Francisco*, *supra*; *Nicolson Pavement Co. v. Painter*, 35 Cal. 704; *McPherson v. Foster*, 43 Iowa, 48; *City of Bryan v. Page*, *supra*. As the city, by the terms of its charter, could not be made liable in any contract, by whomsoever made, which was not in writing or authorized by ordinance, it follows that the learned judge erred in admitting any testimony for the purpose of proving the terms of a verbal agreement. Such testimony was immaterial, as such a contract, if proved, would be of no avail whatever. *Hague v. Philadelphia*, 48 Pa. St. 527.

While conceding the power of the appellant to make the written contract above set forth, we are of the opinion that it had no authority in law to discount its own warrants. Such a proceeding is manifestly beyond the scope of legitimate corporate power, and a practice of that character might lead to ruinous results. City warrants are evidences of indebtedness or promises to pay, and are payable with interest prescribed by law, and the corporation cannot cast upon the taxpayers any further burden in respect thereto, and the courts have uniformly, so far as we are advised, disapproved every effort to do so. *Clark v. Des Moines*, 19 Iowa. 199; *Foster v. Coleman*, 10 Cal. 279; *Bauer v. Franklin Co.*, 51 Mo. 205; *State v. Wilson*, 71 Tex. 291 (9 S. W. Rep. 155).

It is contended, however, on behalf of the respondents, that, inasmuch as the city had power to borrow money, it had the power to discount its warrants as a means of raising money, as a necessary implied power. But we are unable to agree with counsel in this view of the law. The

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power to borrow money was expressly conferred upon the city by its charter, but it was also provided that the amount borrowed, which was limited to a certain sum, should be evidenced by warrants drawing interest at a fixed rate per cent., and therefore nothing was left to implication. Everything pertaining to the power granted was clearly and unmistakably expressed by the legislature.

It is also insisted that the city, by paying a portion of the discount on its warrants in accordance with the agreement of its officers, ratified such agreement, and is now estopped from asserting the contrary. But we are constrained to take a different view of the law, and to hold that an illegal contract is incapable of being ratified; and the fact that counsel for appellant, in the court below, admitted that the contract was thus ratified, cannot avail the respondents here, for that question can only be determined by reference to the law. What the law will not sanction as a contract cannot be made such by the admissions of a party or his counsel. *Polk Co. Sav. Bank v. State*, 69 Iowa, 24 (28 N. W. Rep. 416). And, moreover, as we understand the evidence upon this point, the money actually paid to the respondents as discount was donated for the purpose by private individuals and corporations, and was, therefore, strictly speaking, not disbursed by the city at all, although a portion of it may have passed through the hands of its treasurer. From these considerations it follows that it was error to charge the jury to the effect that the respondents were entitled to recover the difference between 10 per cent. of the face value of the warrants received by them and the amount received on account of discount.

The appellant complains of the instructions of the court given to the jury as to the measure of damages for breach of the contract in question. In the sixth instruction, the jury were advised that if the plaintiffs were compelled, by reason of bad roads and the extra price they had to pay

for the cutting of the stone, to pay an additional amount over and above the price they would have been compelled to pay for the performance of the same services during the time designated in the contract (sixty days from the execution thereof), then they were entitled to recover the additional amount for such hauling and extra expenditures for cutting the stone, if the jury found that such were the natural results of the breach of the contract, in not paying cash as stipulated in the contract. The point is made that the only damages recoverable for a failure to pay cash when due is interest on the money from the time of the default, and we think it is well taken. That this is the general rule of law is shown by the following cases: *Loudon v. Taring District*, 104 U. S. 771; *Insurance Co. v. Piaggio*, 16 Wall. 378. Many cases are cited by the respondents to sustain their contention that damages resulting from delay caused by breach of contract may be recovered by the party not in fault, but we think there is a clear distinction between those cases and the one at bar. In neither of the cases cited was the delay caused by a mere failure to pay money, but was occasioned by a notice or request to suspend operations, or by a failure to furnish necessary and indispensable materials, or to make the necessary preparations for the commencement of the work. When the appellant failed to pay cash when due, according to the terms of the contract, the respondents were at liberty either to stop all work under the contract and sue for the recovery of the resulting damages, or to proceed with the work to completion, notwithstanding the breach. They chose the latter course, and thereby waived such damages as they might have been entitled to if they had adopted the former.

Instruction No. 7 was erroneous for the reasons already given. By it the jury were told that if, by reason of the suspension of cash payment on behalf of the defendant, the

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plaintiffs notified the acting mayor and the bridge committee of the defendant that there would be extra work and extra allowances claimed, and that, after such notification was made and claim preferred, the defendant permitted plaintiffs to proceed with their contract without refusing to allow such claim, and received the benefit of said labor and material, the defendant could not take advantage of or question the validity of the agreement, because of its not being in writing, or authorized by ordinance or resolution of the city council. This instruction is in contravention of the city charter, and is also opposed to the principles laid down in the authorities heretofore cited.

Instruction numbered 8 cannot be sustained, for the reason, already shown, that a contract which the law requires to be in writing cannot be made valid by acquiescence or ratification.

Instructions numbered 9, 10, and 14 are equally faulty. The first two relate to the question of damages, and seem to be based upon the theory that, although the respondents performed their part of the contract after the time therein limited had expired, they were, nevertheless, entitled to recover for the loss of time and extra cost of material occasioned by delay. The fourteenth instruction charged the jury, among other things, that the plaintiffs were entitled to payment of discount on its warrants, and in that regard was erroneous.

It is argued on behalf of the respondents that it would be unjust and unconscionable to permit the city to repudiate the contract of its officers to the detriment of the respondents; and, if it were a question of mere moral obligation, we would feel inclined to adopt the view of counsel. But, the question being a purely legal one, its solution must rest upon legal, and not upon moral or ethical, principles. Wherever a person enters into a contract with an agent of a municipal corporation, he must at his

peril ascertain the extent of such agent's authority, and if he fails to do so, he alone must suffer the consequences. *Zottman v. San Francisco, supra.*

Without further discussion of the questions involved in this case, we conclude that the respondents were, under all the facts and circumstances, only entitled to recover the amount remaining unpaid, if any, according to the terms of their contract, together with legal interest on deferred payments, and the value of the extra stone furnished, which the appellant seems to concede should be paid for, and for which, it contends, it has already paid.

The judgment is reversed, and the cause remanded to the lower court for further proceedings in accordance with this opinion.

DUNBAR, C. J., and SCOTT, STILES and HOYT, JJ., concur.

6	452
8	56
8	64
34*	201
36*	590
33*	759
6	452
J12	440
6	452
438	280
88	282

[No. 934. Decided June 5, 1893.]

THE STATE OF WASHINGTON, *on the relation of T. M. Reed, jr., v. W. C. JONES, Attorney General.*

STATUTES—REGULARITY OF PASSAGE—CONCLUSIVENESS OF ENROLLED BILL.

The enrolled bill on file in the office of secretary of state of an act of the legislature, which is duly signed by the presiding officers of both houses, and otherwise appears fair upon its face, is conclusive evidence of the regularity of all proceedings necessary for its proper enactment in conformity with the constitutional provisions.

Original Application for Mandamus.

John W. Corson, and Roger S. Greene, for relator.

W. C. Jones, Attorney General, for respondent.

The opinion of the court was delivered by

HORT, J.—Respondent, as attorney general, was charged by an act of the legislature, or what purports to be such, with the duty of approving the bond of the relator as one of the board of state land commissioners provided for by said act. This duty he refused to perform, on the ground that what purported to be the act of the legislature was not in fact such, for the reason that the constitutional requirements had not been observed by the legislature in its passage. This proceeding is brought on the part of the relator to compel such action by respondent.

There is a line of authorities which we might follow and dispose of this case without at all entering into the question as to whether or not, in fact, said purported act of the legislature should have force as such, but in view of the great importance of a prompt determination of the question as to whether or not said purported act is in force, and of the further fact that the elaborate briefs filed upon the part of the respective parties will enable the court to as intelligently determine that question in this proceeding as in any other, we have concluded that our duty to the parties and to the public will be best performed by disregarding all preliminary questions which might be raised and determining the rights of the parties upon the broad ground, upon which it has been largely argued, as to whether or not such purported act is in fact a part of the statute law of this state.

It is claimed on the part of the respondent that it cannot have such force by reason of the fact that the legislature has not complied with the constitutional requirements by which a certain subject matter can be enacted into a law. It is not contended but that the enrolled bill on file in the office of the secretary of state is in all respects regular upon its face, and bears the signatures of the presiding

officers of the respective houses of the legislature in due form, and has been regularly approved by the governor, and deposited in said office as required by the provisions of the constitution in that regard. But it is claimed that an examination of the journals of the respective houses will show that the legislature disregarded several mandatory provisions of the constitution which it was incumbent upon them to observe before any bill could become a law. The argument upon what is shown by the journal, and the effect thereof, has been elaborate and full, and the publicity which has been thereby given to the manner in which such journals have been kept, and the want of care exercised by the legislature in seeing that a compliance with constitutional provisions are made to appear therein, cannot but be beneficial, whatever may be the effect thereof in the decision of the question now before the court.

Preliminary to entering upon the question thus argued, we must decide another question, which, if determined adversely to the position of the respondent, will make it improper for us to enter at all upon the discussion as to the effect of the journal entries above referred to. This is as to the effect to be given to the enrolled bill on file in the office of the secretary of state. It is claimed on the part of the relator that such enrolled bill is absolutely conclusive of the fact that it had been regularly enacted into a law by the legislature, and if this be true it is of course immaterial as to what the journals or any other proof may or may not show upon this subject. As to just what force the respondent is willing to concede to such enrolled bill is not entirely clear from his argument, though it may probably be fairly deduced therefrom that he is willing to concede that it *prima facie* establishes the fact of the regularity of its passage through the legislature, but that such *prima facie* proof is overcome whenever there is a suggestion to the court that the journal or other competent proof

June, 1893.]

Opinion of the Court—HOTT, J.

shows that some constitutional requirement has not been complied with; that upon such suggestion the courts must take judicial notice of what the journals show in that regard, and if it appear to the court therefrom that there has been such violation of constitutional requirements it must be held that the enrolled bill is not in force as a law.

That this is the position of the respondent seems certain from the line of authorities which he has cited to sustain it, as nearly or quite all of them hold that such *prima facie* presumption attaches to the enrolled bill. If this is not his position, then it must be that the enrolled bill is proof of nothing, and that in every case the courts and all the inhabitants of the state must take notice of the course of the legislature as to every step relating to the passage of a bill, so far as such steps are made obligatory upon the legislature by the constitution. If the courts were to hold with this latter contention it would lead to such results as to almost justify revolution on the part of the people. With such a construction once sanctioned by the courts, it would follow that in however good faith an individual or an officer might act in view of the law as it appeared in the enrolled bill, such seeming law nor such good faith could in no manner protect him from the result of his acts if in fact the journals failed to show that the act had been regularly passed by the legislature. Hence, a person might, while supposing that he was acting directly in accordance with the laws of the state, be in fact committing a crime, and an officer who should venture to pay out money in pursuance of what thus seemed to be the law, could be called upon to account for the same as having been paid out in violation of all law, if in fact such seeming law had not been constitutionally passed as shown by the legislative journals. That such must be the result, if the signing by the presiding officers and the approval by the governor are to be considered only as steps in the act of making the bill a law, and not in

themselves proof of such fact, seems clear under well settled rules relating to construction. If such signing and approval are only steps, then the fact that they have been taken in no manner proves that any other required step has been taken, and it must follow that before the courts can find that the bill has become a law, they must look and see that all the steps required by the constitution to constitute it such have been observed by the legislature. Such a construction given to the enrolled act would render it practically impossible for the courts even to determine what was the law, and would render it absolutely impossible for the average citizen to ascertain that of which he must at his peril take notice. There is enough injustice in requiring the citizen to take notice of the statute law, when to do so he has only to determine the legal effect of the enrolled acts on file in the office of the secretary of state, and if he is further required to take notice of all that is shown by the journals of the legislature which may affect the regularity with which such acts have been passed, he will indeed be in a sorry condition. The absolutely disastrous result of this construction has led the courts which have held that they could go behind the enrolled act to adopt the theory, which seems to us to be entirely illogical, that the enrolled acts *prima facie*, but not conclusively, establish the fact of their regular enactment. Such holding compels the further one that whenever the attention of the courts is directed to the particular parts of the journal which show a want of compliance with constitutional requirements, the courts must take judicial notice of all facts therein contained in relation to the point to which their attention has thus been called, and if such journals show any want of compliance with the mandates of the constitution, declare such *prima facie* presumption overcome and the law invalid. The result of this construction will lead to results as disastrous and embarrassing as would the other construc-

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tion of which we have been speaking. For a number of years after the passage of an act it may be given force by the courts by reason of the *prima facie* presumption flowing from the finding of the act regularly enrolled and signed in the office of the secretary of state. Then after said act to all intents and purposes has been treated as in force during all of these years, upon the suggestion of some person that there was a fatal omission in the journal entries regarding the passage thereof, the court must take judicial notice of such fact if shown by the journal, and from that time on it must be held not only that such bill was not then a law, but that it never had been such. The confusion as to rights and duties growing out of such a state of uncertainty as to what the statute law of the state is may well appall one who even superficially contemplates the same. Worse than this may happen, however. The suggestion as to the invalidity of the law may be made to one superior court in the state, and from that moment such court must hold the law invalid if the journal shows any constitutional irregularity in its passage, while in another superior court said act will still be given full force as a law by reason of the fact that no suggestion has been made which will authorize the court to go behind the *prima facie* presumption flowing from the enrolled bill. If from the enrolled bill on file it can be conclusively presumed that it has been regularly enacted by the legislature, none of these evil consequences will follow, and the duty of the courts will be confined exclusively to ascertaining the effect of such law.

It follows that, as a matter of public policy as well as of convenience and certainty, the court should adopt the rule which makes such enrolled bills conclusive evidence of their regular enactment, if it can do so without violating some fundamental constitutional provision or well settled rule of construction. As we have already stated, none of the cases cited by respondent go to the extent of holding,

as first above suggested, that the enrolled act on file is proof of nothing at all, and that the fact of its being thus found on file must be supplemented by the further affirmative finding from the journals that it has been regularly enacted before it can be given any force whatever, nor have we been able to find any cases going to that extent. We may, therefore, dismiss that construction from further consideration, though to us it seems to follow more logically from the course of the argument of respondent than does that upon which, under the authorities, he must rest his case.

As a basis for our further discussion, then, it may be accepted as a fact that all of the courts hold that these enrolled bills are *prima facie* the law, and that they must be given force as such until their invalidity is suggested in some proceeding. Yet to hold that this *prima facie* presumption attaches, and a conclusive one does not, seems to us to be illogical in the highest degree. Beside, there is something ridiculous in holding that there can be such a thing as a *prima facie* law. It is true that it is frequently the duty of courts and citizens to accept certain things as *prima facie* proof of what the law is, but that is an entirely different proposition from holding that a certain thing is *prima facie* a law. An act of the legislature, when regularly on file in the office of the secretary of state, is, and must necessarily be, either a law or not a law, and it is preposterous to hold that that which is the law is so only *prima facie*, or to hold that that which is in fact not a law is even *prima facie* so. What constitutes the statutory law of a state must necessarily be an absolute proposition, and not simply a *prima facie* one. The statutes published by authority do not purport to be the law; they only purport to be copies of the law as it is, and *prima facie* show that fact. It is perfectly competent for the legislature, not only to so provide, but it may in almost

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any other way provide, what may *prima facie* be taken to have the force and effect of the original law, but this is the extent to which the legislature can go. It can provide various methods of proving the existence of the original law, other than its actual production, but the entire force of all these substitutes is to show what the original law on file in the office of the secretary of state is. The enrolled bill on file is either what it purports to be, a law regularly passed through the legislature, or it is nothing whatever. If it was in fact regularly passed, it is a law, not simply *prima facie* a law, but conclusively so. If the courts can give any force whatever to the fact that it has not been regularly passed through the legislature, then the courts must take it as the facts show, and cannot in the event of its not having been regularly passed through the legislature give it any force whatever. But, as we have seen, there are none of the courts but what go so far as to hold that such enrolled bills are *prima facie* the law. Upon what ground can they do this? We are unable to discover but one ground upon which any satisfactory reasoning can be founded, and that is because they are the final records of the acts of the legislative department regularly certified by it, as required by the constitution for the information and guidance of the other departments of the government. If they are not such final records then the placing of them on file signed and approved can be no more than one of the steps devolving upon the legislature in making a law, and, until the other necessary steps are also made to appear, there is nothing to show the court in any manner whatever that the necessary steps to make it a law have been taken.

It seems, therefore, to follow as a necessary conclusion that all of the courts have looked upon these enrolled bills as the final records of the legislative department in the enactment of laws, and if this is so, why should they not be

given the sanctity and force incident to final records? If they are final records in any sense whatever it is because, under the provisions of the constitution, interpreted in the light of the universal practice of legislative bodies, it must be held that such bodies are authorized to make up an authoritative record certified in a certain way, and that this record when so made up carries with it as a necessary import the fact that all the steps which led up to the making of such record have been regularly taken, and if from such record it can be *prima facie* presumed that all the necessary steps have been taken, it seems to logically follow that such facts should be conclusively presumed therefrom. The legislature is a coördinate branch of the government, and cannot in any sense be said to be an inferior body; consequently its final record, when certified and recorded as required by the constitution, imports absolute verity. There is no reason why the final record thus made up by the legislative department of the government should not be conclusive of the fact that all the steps necessary to make up such record had been regularly taken, the same as the judgment of a court of competent jurisdiction is of all the facts necessary to sustain it. The decree of a court of general jurisdiction, if fair upon its face, proves itself, and is conclusive of all the facts necessary to sustain it, and upon principle the same rule should obtain as to the final record of the legislature in the enactment of a law. In this regard it may be suggested that the final record of a court of general jurisdiction may be attacked upon several grounds, and the attack sustained by proof of what occurred in the progress of the case before it was made up. This is only true when such attack is made in a direct proceeding against such record and never when the same is brought in question collaterally. And as there is no method provided by the constitution or laws for a direct attack upon an enrolled bill, it follows that if an attack

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upon it is to be made at all it must be made in a collateral proceeding. Hence, the point we are trying to make is aided instead of met by such suggestion.

But it is argued with great force on the part of the respondent that if the courts do not look into the proceedings of the legislature, and set aside laws when not enacted with the formalities required by the constitution, the legislature can at pleasure nullify all such provisions. This is no doubt true, and it is upon this line of reasoning that those courts which have gone behind the enrolled bill have justified themselves in so doing. This line of reasoning seems to assume that the judicial department is charged with seeing that all the mandatory provisions of the constitution are complied with. But is this a reasonable construction, in view of the theory of our government and the principles enunciated in our constitution? Each of the three departments into which the government is divided are equal, and each department should be held responsible to the people that it represents, and not to the other departments of the government, or either of them. What are the respective duties of these departments? They may be briefly stated thus: The legislature enacts laws, and is commanded by the constitution to enact them in a certain way; the executive enforces the laws, and by the constitution it is made his duty to take certain steps looking towards such enforcement in the manner prescribed therein upon the happening of certain contingencies; the judicial department is charged with the duty of interpreting the laws, and adjudging rights and obligations thereunder. What is the law upon which the judicial department must thus determine rights and obligations? It is—*First*, The constitution of the state; *second*, so much of the common law as is in force here, and the laws of the legislature; and, *third*, the acts of the executive department in those matters in which, under the constitution, it is given the power to ex-

ercise discretion under certain contingencies. Such being the respective duties of the several departments, it seems to us that the acts of each of them when certified as required by the constitution, or by such a universal course of practice as to have the force of a constitutional provision, should be conclusive upon each of the other departments, and there would seem to be no more impropriety in the legislature seeking to go behind the final record of a court, for the purpose of determining whether or not it had obeyed the constitutional directions in making such a record, than there would be in the courts seeking to go behind the final record made by the legislative department. As we have seen, the executive, under the constitution, is charged with doing certain things upon certain contingencies happening, and under the constitution he is given no power thus to act excepting upon such contingency; yet if the governor determines that such contingency exists, and acts in pursuance thereof, no court, so far as we have been able to see, has ever sought to inquire into the fact as to whether or not the contingency upon which the governor had founded his action in fact existed. For instance, under the constitution, the governor is authorized to convene the legislature upon extraordinary occasions, and there would seem to be the same reason for a court refusing to give force to his proclamation thus convening the legislature, if, upon investigation, it found that the extraordinary occasion upon which the governor had assumed to act did not in fact exist, as there would be to go back of the record made by the legislature. To preserve the harmony of our form of government it must be held that these several mandatory provisions are addressed to the department which is called upon to perform them, and that neither of the other departments can in any manner coerce that department into obedience thereto. Courts have gone behind the final records of the legislative department upon

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what seems to us a false theory. They have assumed that the mandatory provisions of the constitution are safer, if the enforcement thereof is entrusted to the judicial department, than if so entrusted to the legislature; in other words, they have acted upon the presumption that their department is the only one in which sufficient integrity exists to insure the preservation of the constitution. How the courts have obtained this idea is somewhat difficult to ascertain, but that they entertain it, and have allowed it to influence their decisions, is so evident that even a superficial examination of such decisions will satisfy any one of the fact.

But it is said that all courts assume some superiority over the legislature for the reason that they refuse to give force to an act which upon its face violates some provision of the constitution. A brief examination will show that such conclusion is unwarranted by the fact stated. Courts are called upon to adjudicate rights under the laws of the state. Those laws are made up of the provisions of the constitution, the common law and the acts of the legislature and the acts of the executive, when by the constitution he is authorized to act in such a way as to affect rights or obligations. The constitution comes to all of the departments directly from the people, and is the supreme law of the land, and can in no manner be changed or affected by the action of either the legislative or executive department. The rest of the law comes to each of such departments, authenticated in the way the constitution or custom requires, from the hands of the other departments, and though they each take it as verity, and give it the full force which it can derive as the expressed will of the department from which it emanates, yet when it comes in conflict with the constitution, it must yield, for the reason that such constitution has a sanction greater than could be given by the action of all of the departments, and must

stand as against the action of any one or all of them. Upon principle, then, in view of the division into departments under our form of government, each of equal authority, one department cannot rightfully go behind the final record certified to it or to the public from either of the other departments. And the judicial department is no more justified in going behind the final act of the legislature to see if it has obeyed every mandatory provision of the constitution than has the legislature to go back of the final record made by the courts to see whether or not they have complied with all constitutional requirements.

If we investigate the question in the light of authority, and analyze the cases upon the subject in the light of the principle at the bottom thereof, it will be found that the overwhelming weight of authority is in favor of the proposition that courts will not go back of the enrolled bills on file in the secretary of state's office. It is true that a large number of courts have held that they would investigate the proceedings of the legislature to see if constitutional requirements had been complied with, but even these courts have nearly all of them conceded that the older decisions clearly establish the doctrine that such enrolled acts are conclusive, and have yielded their assent to such doctrine under the constitutions existing at the time the older cases were decided. They have argued, however, that for the reason that the newer constitutions contain many provisions mandatory upon the legislature as to its practice in enacting laws, the courts must see to it that such mandatory provisions are enforced, and as they cannot do this if they hold to said doctrine, they must refuse so to do, and look to the proceedings of the legislature which culminated in the enrolled act. If the courts are justified in the position above suggested, that the judicial department is superior to the others, this reasoning will have force, otherwise it cannot.

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It is further argued that from the fact that most constitutions recently adopted contain an increased number of mandatory directions to the legislature, the courts are justified in changing the old rule and in going behind the enrolled act to see that the legislature obeys such directions. We are unable to see any force in such an argument. Under every government, which has as a part thereof a legislature, certain formalities on the part of such legislature are necessary before any subject matter can be given the force of law, and if the courts could not properly inquire into the fact as to whether or not such formalities had been complied with when but a single one was enjoined upon the legislature, there can be no good reason why it could do so when several are thus enjoined. The theory upon which the courts refused to go behind the enrolled bill when only such single formality was required, was that the enrolled bill was a final record, and imported verity, and if it imported verity when the one formality was required, why should it not import like verity when more than one is required? Under no government of this form could a bill become a law without the vote of a majority of a quorum in its favor, as such must be taken to be a part of the constitution either written or unwritten of every government proceeding according to any constitutional form whatever. If the alleged want of any requirement would justify going behind the enrolled bill, it would seem that it would be the one that a quorum was not present when the bill purported to have been passed for the reason that such an allegation would not only show that a formality required by every constitution before a bill should become a law, had been omitted, but would also show that a legal legislature had not been present at that time. Yet when such requirement was the principal one, substantially all of the courts held that the enrolled bill imported verity, and could not be attacked by showing that a quorum was

not present when it was passed. The cases were not only practically uniform when such single formality was required, but they so continued even after they were called upon to adjudicate as to the effect of such enrolled acts where some provisions of the constitution as mandatory as any of ours were in full force. And in many of the states where such formalities were required by the constitution there was fully as mandatory a provision as to the keeping of a journal, and requiring these formalities to be made of record therein, as is that in our constitution. This course of decisions continued for a long time, until at last some of the appellate courts seemed to assume that it was their duty, not only to supervise inferior courts, but also the other departments of the government.

We shall hereafter review a few of the many cases upon this subject, but at this point a word as to the opportunities for fraud growing out of the holding of such enrolled bills to be conclusive as compared with the contrary holding. We have already seen the disastrous results of the contrary holding in its general effect upon the community, and even a superficial examination of the question will show that the opportunities for committing a fraud upon the members of the legislature themselves will be much greater if the journals are allowed to control than they would be if the enrolled act is held conclusive. The enrolled acts are prepared with some care, and under the rules of our legislature and of every legislative body of which we have any knowledge, some committee is charged with the responsibility of seeing that such enrolled bills are compared with the one which actually passed the legislature before they are presented to the presiding officer for signature. There is, therefore, some protection thrown around these enrolled acts, and it would be a difficult matter for any one through carelessness or fraud to prevent the will of the legislature as expressed in the bill actually passed being

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embodied in the enrollment thereof. But if the doctrine be once established that the fact that such bill had passed can be negatived by the journal, there would be very little to prevent a bill which had been properly passed being defeated by the carelessness or fraud of the journal clerk or some employé under him. Under the practice prevailing in the legislature of this state, and in most of the other states, there is very little assurance that the journal will fully and accurately show the proceedings of the body for which it is kept. The practice in nearly all such bodies is to have the journal read, if read at all, from loose slips of paper made up partly in writing and partly by pasted slips, and after being thus read, ordered approved. It is also a fact of which every one has knowledge that often upon such reading there is such inattention on the part of the members of the legislature that gross errors might pass unnoticed. The journal as thus read and approved from loose slips of paper is then passed to the journal clerk, and by him, or under his direction, transcribed into a book, and the slips then carelessly preserved or entirely destroyed. The transcription of these minutes without any further action on the part of the legislature, or of any person but the one who makes it, except superficial examination by the journal clerk, and possibly by the presiding officer, becomes the formal journal. It follows that the chances of mistake are very great, and for fraud upon the part of the copyist even greater. The constitution requires that there should be a majority of the body recorded as voting in favor of a bill upon its final passage. Upon such passage the bill in fact receives one or two more than such constitutional majority, and is duly passed, but if by carelessness or fraud the copyist should change one or two of the names of those voting, from the affirmative to the negative, the will of the legislature regularly expressed would be defeated. And the same result might follow if in copying

he should omit a name. Not only would such results follow in the cases specified, but in many other ways the least error in making up or transcribing the journal might result in the defeat of the will of the legislature. Unless the method of keeping journals should at once be revolutionized, and so much attention be paid to them that they will be made to absolutely represent all the doings of the body to such an extent as to very much prolong the sessions of the legislature, the sanctity of legislative enactments will be entirely dependent upon the carefulness and good faith of some copyist employed by the legislature at a few dollars a day. Much less evil will grow out of a course of decision which will give the people to understand that the legislative is a department of the government of as high authority as the judicial, and that with the mandatory provisions directed to it the other departments of the government have no concern. When this is once well understood the people will see to it that such mandatory provisions are complied with by the legislature, or if they do not, the blame must rest upon themselves or the system of government which has as its basis the equal authority of the three departments into which it is divided.

We shall not attempt to review to any great extent the cases upon this subject. They are very numerous, and the older ones almost universally recognize the conclusiveness of the enrolled acts, and even under mandatory constitutional provisions, of substantially the same effect as our own, there are enough of the states which have adhered to the old doctrine to furnish us abundant authority for so doing, especially as such a course will in our opinion best subserve the public interest. The reasoning of the cases which uphold such doctrine is much more satisfactory than that of those upon the other side, for, as we have seen, the reasoning of the latter class of cases is founded upon the assumption that the courts are the guardians of all the

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mandatory provisions of the constitution, whether addressed to the judicial, legislative or executive department. This seems to us to be an untenable position, and, if it is, the reasoning of this class of cases is worthy of very little consideration. While upon the other side the cases have for their sanction not only a course of decisions running back hundreds of years, but are also abundantly supported by the reasoning therein contained, founded upon the nature and form of our government and upon grounds of public policy.

In our review of the cases upon the subject we shall omit entirely all reference to the older ones, as it is conceded that they are substantially all in favor of the proposition that the enrolled acts are conclusive. We shall confine ourselves to the cases which may be called modern, and substantially to those in states which have one or more provisions in their constitution directed to the legislature as mandatory as any in our own, and where by the provisions of the constitution the legislature is required to keep and publish a journal of its proceedings.

The constitution of the United States expressly requires a quorum of congress to be present for the transaction of business. It further requires that congress should keep a journal of its proceedings and publish the same from time to time. In *Field v. Clark*, 143 U. S. 649 (12 Sup. Ct. Rep. 495), the effect which the court would give to an enrolled act was directly passed upon, and after an elaborate consideration it was held that the court must accept it as conclusive proof that it had been regularly passed by congress. This case is entitled to more than ordinary consideration, for the reason that it was briefed by counsel of national reputation, and involved questions of the greatest magnitude. It is contended by respondent that much of the force of this case is lost by reason of the fact that the number of mandatory provisions in the constitution of

the United States is small compared with that in our own, but since, as we have attempted to show, the single requirement was of the most radical character, and went to the foundation of our form of government, such fact can in no manner detract from the force of the decision. And we cannot agree with the further contention of the respondent, that the judge who wrote the opinion intended to give any force to this line of argument in the reference therein made to the course of decisions in the states which had as a part of their constitution numerous mandatory provisions of this nature. We look upon the use of such language as having been simply by way of argument, and as tending to show that even although the decisions in such states might be warranted under their constitutional provisions, yet such fact did not necessarily militate against the position taken by him.

In the State of Louisiana, when the constitution of that state contained, among other mandatory provisions, one requiring it to keep a journal, and the express provision that "no bill shall have the force of a law until on three several days it be read in each house of the general assembly, and free discussion allowed thereon, unless four-fifths of the house where the bill is pending may deem it expedient to dispense with the rule," the supreme court of that state in the case of the *Louisiana State Lottery Co. v. Richoux*, 23 La. An. 743, directly held that the enrolled bill was conclusive upon the courts of the fact that all constitutional requirements had been complied with in its passage.

In *Whited v. Lewis*, 25 La. An. 568, the question was again before the court, and the same doctrine was unhesitatingly announced.

The constitution of the State of Mississippi contained many provisions as mandatory as any in our constitution, and in *Green v. Weller*, 32 Miss. 650, after a most elaborate

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consideration, it was adjudged by the supreme court of that state that the enrolled act was conclusive. Under the particular facts of that case there was some division of opinion among the members of the court for the reason that the bill, the effect of which they were passing upon, was one providing for a constitutional amendment, and some of them thought that proposals for amendments to the constitution should stand upon a different basis than other acts of the legislature; but they all agreed that the rule would obtain in full force when applied to an ordinary act of the legislature.

In *Swann v. Buck*, 40 Miss. 268, the same court had before it the question of the effect to be given to an enrolled act on file in the proper office, and held directly that such acts, when enrolled, signed by the presiding officers of the two houses, approved by the governor, and deposited in the office of the secretary of state, had all the legal incidents of a record, imported absolute verity, and could not be impeached.

In *Brady v. West*, 50 Miss. 68, this court seems inclined to the contrary doctrine, but in *Ex parte Wren*, 63 Miss. 512, after a very full consideration of all the cases, the court returned to the doctrine originally announced, and showed by the most cogent reasoning that such enrolled acts were and must necessarily be conclusive upon the courts.

In the constitution of the State of New Jersey there were many mandatory provisions directed to the legislature, among which was one requiring a majority of all the members to vote in favor of the final passage of a bill before it became a law by ayes and noes, to be entered upon the journal. In *Pangborn v. Young*, 32 N. J. Law, 29, the question under discussion was passed upon by the court of errors and appeals of that state, and after most elaborate

consideration it was held that the courts could not go behind the enrolled act.

The State of Indiana has several provisions in its constitution of the mandatory nature of which we have been speaking, yet its supreme court has in a number of cases decided that the prior proceedings of the legislature could not be gone into for the purpose of affecting the validity of the enrolled act on file in the office of the secretary of state. One of such cases was that of *Evans v. Browne*, 30 Ind. 514, in which the court made use of language which so well meets the position taken by many who argue against the rule for which we are contending that we quote a portion thereof:

“But it is argued that, if the authenticated roll is conclusive upon the courts, then less than a quorum of each house may, by the aid of corrupt presiding officers, impose laws upon the state in defiance of the inhibition of the constitution. It must be admitted that the consequence stated would be possible. Public authority and political power must, of necessity, be confided to officers, who, being human, may violate the trusts reposed in them. This perhaps cannot be avoided absolutely. But it applies, also, to all human agencies. It is not fit that the judiciary should claim for itself a purity beyond others; nor has it been able at all times with truth to say that its high places have not been disgraced. The framers of our government have not constituted it with faculties to supervise coordinate departments and correct or prevent abuses of their authority. It cannot authenticate a statute; that power does not belong to it; nor can it keep the legislative journal. It ascertains the statute law by looking at its authentication, and then its function is merely to expound and administer it. It cannot, we think, look beyond that authentication, because of the constitution itself. If it may, then for the same reason it may go beyond the journal, when that is impeached; and so the validity of legislation may be made to depend upon the memory of witnesses, and no man can, in fact, know the law, which he is bound to obey. Such consequences would

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be a large price to pay for immunity from the possible abuse of authority by the high officers who are, as we think, charged with the duty of certifying to the public the fact that a statute has been enacted by competent houses. Human governments must repose confidence in officers. It may be abused and there may be no remedy.

“Nor is there any great force in the argument which seems to be regarded as of weight by some American courts, that some important provision of the constitution would be a dead letter if inquiry may not be made by the courts beyond the rolls. This argument overlooks the fact that legislators are sworn to support the constitution, or else it assumes that they will willfully violate that oath. It is neither modest nor just for judges thus to impeach the integrity of another department of government, and to claim that the judiciary only will be faithful to its obligations.”

In the State of California the courts have been upon both sides of the question. In the first case, *Fowler v. Peirce*, reported in 2 Cal. 165, it was held that the courts would go behind the enrolled act. But in *Sherman v. Story*, 30 Cal. 253, the court, after a most thorough consideration of the question in all its aspects, and in an opinion showing great research and learning, rendered by that distinguished jurist, Judge SAWYER, came to the conclusion that the enrolled act was conclusive, and overruled the former case. This case in our opinion is entitled to great weight, for although there has been an attempt to show that a different ruling would have obtained had the present constitution of California been in force, we are not satisfied that such would have been the case; for while it is true that the supreme court of that state since the adoption of its new constitution has gone back to its original position, the opinions in the cases in which it has done so show upon their face that they received no such consideration as did the one reported in 30 Cal. above cited. It is true that the distinguished jurist who wrote the opinion in *Sherman v. Story*, *supra*, afterwards, when holding a fed-

eral court, came to the conclusion that under the new constitution of California the courts were authorized to go behind the enrolled act, but we do not think that in the latter case his reasoning at all compares with that in the former, and it is probable that his mind was unconsciously influenced by the fact that the legislation embodied in the bill under consideration was so unjust that Judge FIELD, of the supreme court, was willing to set it aside as being in violation of the constitution of the United States. And here it may be remarked that in the great majority of cases in which the courts have held that they could go behind the enrolled act, the legislation attacked has been of such a vicious nature that the mind of any honest judge would naturally seek some excuse by which its effect could be destroyed.

The constitution of Pennsylvania had mandatory provisions directed to its legislature of a pronounced type, and yet the supreme court of that state, in a comparatively recent decision, that of *Kilgore v. Magee*, 85 Pa. St. 401, fully recognized the doctrine for which we are contending, and, in its opinion therein rendered, made use of the following pertinent language:

“In regard to the passage of the law and the alleged disregard of the forms of legislation required by the constitution, we think the subject is not within the pale of judicial inquiry. So far as the duty and the consciences of the members of the legislature are involved, the law is mandatory. They are bound by their oaths to obey the constitutional mode of proceeding, and any intentional disregard is a breach of duty and a violation of their oaths. But when a law has been passed and approved and certified in due form, it is no part of the duty of the judiciary to go behind the law as duly certified to inquire into the observance of form in its passage. The presumption applies to the act of passing the law, that applies generally to the proceedings of anybody whose sole duty is to deal with the subject. The presumption in favor of regularity is essen-

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tial to the peace and order of the state. If every law could be contested in the courts on the ground of informality in its enactment, the floodgate of litigation would be opened so widely, society would be deluged in the flow."

In *Weeks v. Smith*, 81 Me. 538 (18 Atl. Rep. 325), the supreme court of that state, after a review of the authorities *pro* and *con*, decided that the enrolled act was conclusive upon the courts.

In *Pacific Railroad v. Governor*, 23 Mo. 353, the supreme court of that state, in sustaining the doctrine for which we are contending, made use of the following language:

"The constitution is designed to limit the powers of the government, and to confine each of the departments to its appropriate sphere. If the legislature exceed its powers in the enactment of a law, the courts, being sworn to support the constitution, must judge that law by the standard of the constitution, and declare its validity. But the question whether a law on its face violates the constitution, is very different from that growing out of the non-compliance with the forms required to be observed in its enactment. In the one case, a power is exercised, not delegated, or which is prohibited, and the question of the validity of the law is determined from the language of it. In the other, the law is not, in its terms, contrary to the constitution; on its face it is regular, but resort is had to something behind the law itself in order to ascertain whether the general assembly, in making the law, was governed by the rules prescribed for its action by the constitution. This would seem like an inquisition into the conduct of the members of the general assembly, and it must be seen at once that it is a very delicate power, the frequent exercise of which must lead to endless confusion in the administration of the law."

In *Scarborough v. Robinson*, 81 N. C. 409, this question in principle was passed upon, and the peculiar circumstances render it particularly pertinent to the question now under discussion. In that case an act had regularly passed

the legislature, but had failed to receive the signature of one of the presiding officers, and it was sought to give it force by proving the fact of its regular enactment otherwise than by the enrolled bill properly signed. The court held that this could not be done; that the enrolled bill was the final record of the legislature in the enactment of a law, and that such final record was the only thing of which the court could take notice.

The constitution of the State of Texas abounded in mandatory provisions of the most positive nature, directed to the legislature, yet in the recent case of *Ex parte Tipton*, 28 Tex. App. 438 (13 S. W. Rep. 610), it was held, after full consideration, that the courts could not go behind the enrolled act for any purpose whatever.

In *State v. Swift*, 10 Nev. 176, this question was fully considered, and in the opinion therein rendered the matter very ably argued, and the conclusion reached that enrolled bills are conclusive.

In addition to the above cases we have examined each of the following cases and cite them as being directly in point upon the question which we are discussing: *People v. Burt*, 43 Cal. 560; *Standard Underground Cable Co. v. Attorney General*, 46 N. J. Eq. 270 (19 Atl. Rep. 733). And the following cases which though not so directly in point clearly sustain the principle for which we are contending: *Duncombe v. Prindle*, 12 Iowa, 1; *Clare v. State*, 5 Iowa, 509; *Eld v. Gorham*, 20 Conn. 8; *Warner v. Beers*, 23 Wend. 172; *Hunt v. Alstyne*, 25 Wend. 605; *People v. Devlin*, 33 N. Y. 269; *People v. Commissioners*, 54 N. Y. 276; *Fouke v. Fleming*, 13 Md. 392; *Bender v. State*, 53 Ind. 254; *Brodnax v. Groöm*, 64 N. C. 244; *Freeholders v. Stevenson*, 46 N. J. Law, 173.

This citation of cases not only furnishes us abundant authority for holding that the enrolled acts are conclusive, but equally good reason for so holding appears in what has

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been said by the courts in the states in which the contrary doctrine obtains. In recent opinions rendered in several cases in the courts of these states the judges, while recognizing the fact that the rule was so well settled there that they could not properly change it, have expressed regret that the rule which holds to the conclusiveness of such enrolled bills had not been adopted therein. Even in the state of Illinois, where the courts have established a rule of the utmost liberality as to their right to go behind the enrolled acts, the judge who pronounced the decision of the supreme court of that state in a comparatively recent case, that of *People v. Starna*, 35 Ill. 136, seems to clearly indicate that he regretted that a different rule had not been adopted by the courts of that state. If, in that state, which may be said to have been the leader upon that side of the question, even a doubt is expressed as to the policy of the rule there adopted, it is a fact so pertinent that it is entitled to great consideration when a rule upon this subject is to be first announced by the courts of a state.

In our opinion, authority, reason, public policy and convenience require us to hold that the enrolled bill on file, when fair upon its face, must be accepted without question by the courts as having been regularly enacted by the legislature. It follows that the act under consideration is a part of the statute law of the state, and that thereunder it was the duty of the respondent to have approved the bond of the relator, and, he having refused to perform this duty a peremptory writ of *mandamus* must issue requiring such action on his part.

DUNBAR, C. J., and SCOTT, ANDERS and STILES, JJ.,
concur.

6	478
10	86
33*	1067
38*	857
6	478
14	590

[No. 601. Decided June 7, 1893.]

FELIX PROULX, FRED TERRIEN, EUGENE CHEVRET AND
SAMUEL CHARETTE, *Respondents*, v. STETSON AND POST
MILL COMPANY AND A. J. BAKER, *Appellants*.

LOGS AND LOGGING—LIENS—UPON WHAT PROPERTY MAY BE
CLAIMED—FOR WHAT LABOR—MISTAKE IN AMOUNT DUE—
JUDGMENT BY DEFAULT—ATTORNEY FEES.

Under §§ 1679 and 1690, Gen. Stat., one who has performed labor in securing saw logs may enforce a lien against a part of the property upon which he has expended labor for all the labor performed upon the whole lot of saw logs, provided the logs all belonged to the same owner, and the labor was performed under one entire contract. (STILES, J., dissents.)

One who constructs a necessary road by which certain logs are taken from the forest to the mill, or to the water and afterwards to the mill, or to market, as much assists in obtaining and securing such logs as if he were engaged in cutting or sawing them, and is entitled to a lien for such labor.

An innocent mistake in a lien notice as to the exact amount due a laborer for his hire will not defeat the lien.

Although a formal default may not have been entered against a defendant before the trial of a cause, yet the supreme court will uphold a judgment against him on appeal, where it appears by the record that the time for answering had expired, and that testimony was given at the trial as to the amounts due from him to plaintiffs.

Where the amount of attorney's fee in an action for the foreclosure of logger's liens is left to the discretion and decision of the court, a judgment therefor will not be disturbed, although no testimony may have been offered as to the reasonable value of such services.

Appeal from Superior Court, King County.

Battle & Shipley, for appellants.

W. D. Lambuth, for respondents.

The opinion of the court was delivered by

ANDERS, J.—The respondents instituted a joint action against one James V. Taylor to recover the amounts al-

leged to be severally due them for labor in securing saw logs, and to foreclose loggers' liens on a certain boom of logs, consisting of about 388,000 feet in quantity, which were alleged to be in the possession of the Stetson & Post Mill Company as the vendee of Taylor. Baker intervened in the action, by leave of the court, and joined with the defendant mill company in resisting the foreclosure of plaintiffs' liens. Taylor did not appear in the action, and the plaintiffs obtained judgment against him for the respective amounts found due them, and a decree establishing and foreclosing their liens. The mill company and the intervenor appealed.

The complaint, in the several causes of action, alleges in substance that each of the respondents worked a certain number of months, or days, in securing saw logs, and that they ceased to labor upon the logs in question on the 3d day of December, 1890, but it nowhere alleges the number of days worked by each respondent upon the boom of logs upon which they seek to foreclose a lien, or the date at which they began to labor thereon. The lien notices were made a part of the complaint. It is shown by the record that each of the respondents was hired by Taylor to work in his logging camp by the month at a specified rate of wages, and that while so employed they performed labor in getting out other logs than those in controversy, and which were rafted and perhaps disposed of and taken away, before they ceased work under their contracts, and even before work was commenced upon the particular logs upon which the liens are claimed. The lien notices state that the labor and assistance therein mentioned was performed in obtaining and securing said logs, meaning the logs in dispute. And the appellants claim that there is a fatal variance between the allegations of the complaint and the notice and proofs. In other words, their contention is that it should have been alleged and proved that all of the labor

for which a lien is claimed was performed upon these identical logs, and that no lien can attach for services, any part of which was rendered in securing other logs, although all the labor was performed for the same party, in the same logging camp, and under one continuous contract.

We do not so construe the law. Sec. 1679, Gen. Stat., provides that "every person performing labor upon, or who shall assist in obtaining or securing sawlogs . . . has a lien upon the same for the work or labor done upon or in obtaining or securing the same, whether such work or labor was done at the instance of the owner of the same or his agent." If that section stood alone there would be some force in appellants' contention. But this provision must be read in connection with § 1690, which provides, in substance, that any person who shall bring an action to enforce his lien has a right to demand that such lien be enforced against the whole or any part of the sawlogs upon which he has performed labor, or which he has assisted in obtaining or securing, during eight calendar months next preceding the filing of his claim of lien, for all his labor upon or for all his assistance in obtaining or securing said logs during the whole or any part of the said eight months. The construction of the statute contended for by the appellants would render this latter section meaningless or nugatory, and would, in many instances, deprive the laborer of the benefit of the greater portion of his labor.

In cases where a portion of the logs have been lost, or disposed of by the owner, during the progress of the general business of logging, it would certainly be a harsh rule that would impose upon one who rendered necessary services in securing all the logs produced during the eight months' time limit, or during the time of his employment, the necessity of ascertaining the exact amount due for labor performed upon the remainder, and then permit him to foreclose his lien only for that amount, although the

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value of the logs remaining may be amply sufficient to secure the amount due for his entire services. And such, we think, was not the intention of the legislature. These lien statutes are remedial in their nature, and ought to be liberally construed in the interests of labor, and courts do almost uniformly so construe them. Even under statutes no more comprehensive in their terms than § 1679, and containing no such provision as is found in § 1690 of our statute, it has been held, and we think justly, that a laborer might enforce his lien against a part of the property upon which he has expended labor for all the labor performed upon the whole, provided the property belonged to one owner and the labor was performed under one entire contract. Under such circumstances, the labor is deemed, in legal contemplation, performed wholly upon such part of the logs. *Martin v. Wakefield*, 42 Minn. 176 (43 N. W. Rep. 966); *Appleman v. Myre*, 74 Mich. 359 (42 N. W. Rep. 48). We are unable to perceive why the rule should be otherwise. No hardship can result from its application, unless it be to the laborer himself. It can certainly work no injury to the owner to compel him to pay his debt out of the proceeds of part of his property rather than the whole thereof; and persons who purchase property subject to a lien do so at their peril in any event.

There is nothing in the statute requiring a laborer in a logging camp under a general contract of employment, to incur the expense and trouble of filing a lien as often as the owner of the logs for whom he works may see fit to "boom" a portion of them for his own purposes. All that is required is that the claim of lien be filed within thirty days after the close of the rendition of services, in which event it attaches upon all the logs upon which, or in the securing of which, the claimant performed labor, or rendered assistance, for a period of eight months prior thereto. That the claimant's rights cannot be affected by

the mere fact that the logs which he assisted in securing may have been made up into different booms, where each boom is not worked upon under a separate contract, was recently decided by this court in the case of *Overbeck v. Calligan*, ante, p. 342.

It appears from the record that at least three of the four respondents worked a portion of the time while employed by Taylor in constructing roads to be used, and which were used, in the transportation of logs from his camp to the water, and that the value of such services was included in the amount for which they seek to foreclose their liens. By so doing the appellants urge that these respondents have mingled privileged with non-privileged claims, and thereby destroyed their liens as a whole. While not disputing the proposition of law that a lien claimant might so commingle claims for which no lien is given with those for which a lien is awarded, as to invalidate the lien even as to the unobjectionable portion of the claim, yet we do not think that this is a proper case for the application of the principle. To our minds it is plain that one who constructs a necessary road by which logs are taken from the forest to the mill, or to the water and afterwards to the mill, or to market, as much assists in obtaining and securing such logs as if he were engaged in cutting or sawing them. Saw logs can no more be "obtained" or "secured" without proper roads by means of which they may be conveyed to some place where they may be utilized as such than they can be without axes or saws or any other of the various tools and appliances necessarily used in conducting a logging camp. One man may be exclusively engaged in driving a team used in hauling the logs, another in felling the trees, and still another in sawing the trees into convenient lengths, but they are each and all in contemplation of the statute engaged in the same business, namely, getting out saw logs. The statute is broad enough

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to fairly include all kinds of labor necessarily performed in and about a logging camp. And, lest the courts might be inclined to construe it too narrowly, the legislature has itself declared that the cook in a logging camp shall be entitled to the benefits of the statute. The fact that a logging road, constructed for the purpose of transporting a particular lot of logs, may subsequently be used for the transportation of other timber is perfectly immaterial. As well might we say that a laborer who necessarily spends a portion of his time in grinding axes or filing saws shall not have his lien because these implements may afterwards be used in getting out other logs.

It is claimed by the appellants that the fact that the court below found that there was due the respondents, or some of them, for their services, a less amount than was claimed in their lien notices, defeats the liens. We fail to discover in the record the testimony upon which the court based its conclusions in this regard, but assuming the fact to be as found, we do not think the liens should, for that reason alone, be declared invalid. There is nothing to show that either of the claimants willfully attempted to claim a lien for more than was justly due him, or that either of them did not state the amount of his demand after deducting all just credits and offsets, "as near as possible," at the time of filing his notice in the auditor's office. We are not willing to concede that innocent mistakes as to the exact amount due laborers for their hire shall deprive them of the benefit of a statute specially enacted in their interest. And, in this respect, we think we are in accord with the authorities under statutes analogous to ours. Phillips on Mech. Liens (2d ed.), § 356; 2 Jones on Liens, § 1413.

The record fails to show affirmatively that a formal default was entered against the defendant Taylor before the trial of the cause, but it does appear that the time for an-

swering had expired, and that testimony as to the amounts due from him to the respondents was given at the trial. Aside from the presumptions that prevail in favor of the regularity of the proceedings of courts of general jurisdiction, the facts in this case are not similar to those in the case of *Dexter Horton & Co. v. Sparkman*, 2 Wash. 166 (25 Pac. Rep. 1070), in which this court ruled that a judgment given without a default having been entered, and without proof of the amount due, was erroneous; and the decision in that case is, therefore, not controlling here, and the objection of appellant upon that ground cannot be sustained.

The trial court gave judgment in favor of the respondents for the sum of fifty dollars as attorney's fees, and the appellants contend that the court erred in so doing for the reason that no testimony was offered to show the reasonable value of the services of counsel in this action. As a general rule, where the value of such services is alleged in the complaint, in order to recover, it must be proved, and this court, in effect, so held in *Cowie v. Ahrenstedt*, 1 Wash. 416 (25 Pac. Rep. 458). But in this case the appellants, in their answer, have admitted that any sum less than fifty dollars is a reasonable attorney fee by simply denying that that particular sum is reasonable. And, besides, we gather from the findings of the court that the question of the *amount* of attorney's fees, which was the only issue, if any, raised by the pleadings upon that subject, was, as we infer, without objection, left wholly to the discretion and decision of the court without calling witnesses. Under these circumstances, and in view of the fact that the amount fixed by the court is a very moderate one, we do not feel disposed to disturb the judgment on the ground of error in that particular.

But we are of the opinion that the decree in so far as it establishes a lien in favor of the respondent Terrien must

be reversed, as we are unable to find in the record any proof whatever of the amount due him, or even any evidence that anything whatever was due him from Taylor, either at the time of the trial or at the time of the filing of his notice of claim of lien. If any such testimony was offered we fail to discover it, and the appellants assert in their brief that none was produced. He did not testify in his own behalf, and his witness not only did not undertake to show the amount due him, but did show a different contract of employment in one respect between him and Taylor from that set forth in his claim of lien.

The judgment of the lower court is affirmed, except as to the lien of Fred Terrien, as to which it must be reversed.

DUNBAR, C. J., and SCOTT, J., concur.

STILES, J. (*dissenting*).—My objections to the opinion of the court are confined entirely to the first point. The statute says that those who labor in getting out logs shall have a lien for all such labor performed within the previous eight months. But I take it that the intention is that the lien notice as well as the complaint shall state the facts, and that was not done in this case. These notices did not apprise either the owner or the purchaser that any wages were claimed except such as were earned in the production of the particular logs sought to be foreclosed upon, and until the trial it was not known that in the neighborhood of half of the claims were for wages earned by labor upon entirely different logs; and for that reason they ought to have been rejected as not complying with Gen. Stat., § 1685.

HOYT, J., dissents.

[No. 799. Decided June 7, 1893.]

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L. H. PATCHEN AND GEORGE PATCHEN, *Respondents*, v.
THE PARKE AND LACY MACHINERY COMPANY, *Appellant*.

CONSTITUTIONAL LAW—JUDICIAL COMMENT ON FACTS—ACTION ON ACCOUNT—EVIDENCE—NON-SUIT—CROSS-EXAMINATION OF WITNESS.

An incidental allusion by the court to the facts in a cause, in determining a motion for a non-suit, is not a violation of § 16, art. 4. of the constitution, prohibiting a judge from commenting on the facts.

Where an order upon a debtor is given by a creditor to a third party to whom he is indebted, the amount of indebtedness to such third party is immaterial in establishing the amount due from the debtor to the creditor.

The fact that such order operated as an assignment of the account cannot be raised for the first time on appeal.

In an action to recover a balance due upon account, it is error to non-suit the plaintiff, when it appears from the evidence that he had given an order to a third party for the sum due from defendant, on the supposition that it was a certain amount, but in fact, as the evidence showed, there was a further balance due him.

Where a witness is put upon the stand to identify the signature to a receipt which was claimed to have been given such witness, as defendant's agent, in full of account, and was offered for the purpose of proving payment, such witness may be properly cross-examined as to the moneys he has received and paid out for and on account of the plaintiff.

Appeal from Superior Court, Spokane County.

Fenton, Henley & Fenton, for appellant.

W. M. Ridpath, and *Feighan, Wells & Herman*, for respondents.

The opinion of the court was delivered by

SCOTT, J.—The plaintiffs placed in the hands of the defendant certain machinery to be sold for them by the de-

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fendant. The proceeds over and above a sum owing by plaintiffs to defendant were to be paid to the plaintiffs. Sales of said machinery were made from time to time by the defendant, and orders were given by plaintiffs to other persons upon the defendant for various sums of money received therefrom. The last order given purports to be as follows:

“SPOKANE, Sept. 4, 1891.

“*The Parke & Lacy Machinery Co., Spokane:*

“GENTLEMEN—Please pay O. C. Ross whatever may be due us on account in your book, in settlement of machinery account in full. PATCHEN BROS.”

Sixty-seven dollars and sixty-nine cents was paid by the defendant to said Ross upon this order, whereupon Ross delivered the order to defendant, together with a receipt for the specific sum with the following words added: “Being the amount in full due Patchen Bros. on account of machinery as by their order.” Subsequently thereto, the plaintiffs, claiming that the defendant had not accounted for all of the moneys due them by reason of the sale of such machinery, instituted this suit, and, obtaining a judgment for \$295 therein, the defendant appealed.

The first ground of error alleged is with reference to a remark made by the court in ruling upon the motion for a non-suit made by the defendant. In denying said motion the court said:

“The defendant seems to admit in his answer that the machinery was of the value of \$800, and he does not seem to have accounted for that amount.”

This is the language complained of. It is contended that it is a violation of the constitutional provision, §16, art. 4, prohibiting a judge from commenting upon the facts in the case. This point is not well taken. An incidental allusion to the facts called to the court’s attention in de-

termining a motion for a non-suit is not error. *Blue v. McCabe*, 5 Wash. 125 (31 Pac. Rep. 431).

The second ground of error is founded upon a question asked one of the plaintiffs upon cross examination, which was, "How much were you owing Mr. Ross at the time you gave him this order you have spoken of?" This was objected to as immaterial, and the objection was sustained, and we think properly so, as we are unable to see how any question as to the indebtedness of the plaintiffs to Ross could be material in this action. It was of no consequence how much, or whether or not, the plaintiffs owed Ross anything at the time they gave him the order.

The third ground of error alleged is the denying of appellant's motion for a non-suit. Appellant contends that said order given by plaintiffs to Ross was in effect an assignment of whatever sum was owing by the defendant to the plaintiffs, and that it, together with Ross's receipt, showed a full payment of all liabilities from the defendant to the plaintiffs. When the motion for the non-suit was made, said order had not been introduced in evidence. The testimony of the plaintiffs showed that eight hundred dollars had been received by defendant for the machinery sold, and only a portion of this amount had been accounted for. At the time the order was given to Ross, one of the plaintiffs asked the defendant's bookkeeper how much was due them, and was told that the amount was \$67.69, whereupon said order was given. The testimony as it stood at the time the motion for the non-suit was made was to the effect that the order had been given for this specific sum. There was no proof at that time before the court that an order had been given for all moneys due and owing the plaintiffs from the defendant, although there is some testimony to show that at the time this order was given it was supposed that the amount of such indebtedness was but

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\$67.69, but the evidence as it then stood showing that there was a further balance due the plaintiffs from the defendant, the motion was properly denied.

The question as to the order aforesaid being an assignment was never at any time before the lower court as appears by the record. Said order and the receipt given by Ross were introduced for the purpose of showing a settlement with the plaintiffs, and that payment in full had been made by defendant to Ross of all moneys due the plaintiffs. The order and receipt were put in evidence by the defendant in making its case, but the court was not asked to instruct the jury that said order operated as an assignment of all moneys due the plaintiffs from the defendant, and that consequently the plaintiffs could not maintain their action.

It was contended by the plaintiffs that the order had been altered, and was not as it was originally given. It is claimed that the words, "in settlement of machinery account in full," were not contained in the order when given by the plaintiffs, and had been added without their knowledge or authority. This, of course, would have some bearing upon the question as to whether there was a settlement between the plaintiffs and defendant at the time the order was given, which was a matter for the jury to dispose of, but we agree with the appellant that those words did not materially alter the order in relation to the other question as to its being an assignment of the entire claim of the plaintiffs against the defendant. But, as that question was not raised in the lower court, it is not available here.

The next ground of error complained of is in relation to the cross examination of one W. C. Hendrie, the defendant's managing agent, and the person with whom the agreement had been made by the plaintiffs. He was put upon the stand by defendant to prove the signature of O. C. Ross

to the receipt aforesaid purporting to be in full of all moneys due the plaintiffs, which he identified, and said receipt was offered in evidence; whereupon the court, over the objections of the defendant, permitted the plaintiffs to cross examine said witness as to the moneys he had received from the sales of such machinery, and as to the amounts he had paid out for and on account of the plaintiffs. We think this was proper cross examination. It is true said witness had only been asked to identify the signature of Ross to the receipt in question, but this receipt was offered for the purpose of showing payment in full of the plaintiffs' demands against the defendant, and the court rightly permitted the plaintiffs to cross examine this witness as to the moneys he had received and paid out for and on their account.

It is further contended that the court erred in permitting the plaintiffs upon rebuttal to introduce evidence to contradict the statements made by the witness Hendrie upon his said cross examination, on the ground that such cross examination was improper, but as we have held the objection not well taken, it follows that the evidence in rebuttal was permissible.

Error is claimed as to two of the instructions given by the court to the jury which were pertinent to and founded upon the issues as to settlement and payment. The only exception taken thereto was as follows: "The defendant, by its counsel, in open court, excepted to the giving of instructions numbered 11 and 12." No ground whatever was specified. It is now urged that said instructions were erroneous because the point that said order operated as an assignment was ignored in them. But what we have said as to this point heretofore disposes of the question. It was not claimed or even suggested by the defendant, in the exception taken, or elsewhere during the trial, that the order

June, 1893.] Opinion of the Court—DUNBAR, C. J.

operated as an assignment and the exception taken was insufficient to raise the question, under the circumstances of this case.

Finding no error in the case, the judgment is affirmed.

ANDERS and STILES, JJ., concur.

DUNBAR, C. J., concurs in the result.

HOYT, J., dissents.

[No. 853. Decided June 7, 1893.]

WASHINGTON NATIONAL BANK, *Respondent*, v. EBEN
PIERCE, *Appellant*.

BANKS AND BANKING—DISCOUNTING PROMISSORY NOTE—NOTICE
OF FRAUD—EVIDENCE.

A remark by the maker of a promissory note to the president of a bank that the note was procured by fraud and that he would not pay it, does not bind such bank, although it subsequently discounts the note, when such communication was not made to the president in his official capacity, and was not made at the bank nor with reference to the bank's business.

In an action by a bank upon a promissory note payable one year after date, and which had been discounted by the bank a month before maturity, it is not error for the court to sustain an objection to the question, "Is it customary in that business to discount paper that has run nearly the entire time, long time paper like this, without some inquiry?"

Appeal from Superior Court, Pierce County.

Stevens, Seymour & Sharpstein, for appellant.

Frank D. Nush, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—Defendant made his promissory note in writing wherein he promised to pay to the order of one

Cromwell fifteen hundred dollars one year after date, with interest at ten per cent. until paid. Before the note became due, the plaintiff, a bank, purchased the same from Cromwell at a discount. After demand and refusal to pay, the bank brought this action to collect the note from defendant, appellant herein. The defendant for answer alleged fraud on the part of Cromwell in procuring the note, want of consideration, false representations, etc., and alleged that prior to the time said note came into the possession of plaintiff, that plaintiff well knew, had full knowledge and due notice that the said note was obtained by fraud, and was given without consideration, and that the defendant intended to resist the payment of the same. Upon the trial of the cause the court instructed the jury to return a verdict for the plaintiff for the amount prayed for.

The view we take of the insufficiency of the notice given to the bank renders unnecessary an examination of the question of want of consideration; for, conceding that the note was fraudulently obtained, we think that the testimony very clearly shows that Ouimette, the president of the bank, did not have such notice as would bind the bank. It is doubtless true that under certain circumstances notice to the president of a bank is notice to the bank, but we think that no case can be found where notice given under the circumstances testified to in this case is held binding on the bank. The testimony of appellant concerning this notice was as follows:

“We were at the office of the North Pacific Insurance Company, of which company we were both directors and stockholders, and at that time the matter came up, and I told Mr. Ouimette that this note was procured from me by fraud and misrepresentation and right out lying, and that I would not pay it.”

But the communication was not made to Ouimette as the president of the bank; it was not made at the bank, or with

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any reference to the bank's business; the business of another company was being discussed at the time, which was in no way connected with the bank, and; so far as the testimony shows, Ouimette made no response to the remark, and probably cared nothing about it, as it was a matter that did not interest him. Surely there is nothing in the law that will charge him with the duty of remembering, as president of the bank, such a remark, made under such circumstances and in such a place, and of communicating such a remark to the cashier of the bank, whose duty it is to conduct transactions of this kind for the bank.

Appellant places considerable stress on the fact that the note, which was due in one year after its execution, was not purchased by the bank until it lacked only one month from being due, and that the court erred in sustaining the objection to the question, "Is it customary in that business to discount paper that has run nearly the entire time, long time paper like this, without some inquiry?" We think the question was entirely irrelevant from any standpoint. The note had not matured, and that was all the inquiry the bank was bound to make. The presumption of the *bona fides* of the transaction was just the same one month before it became due as it was eleven months before it became due. The law fixes the time when the presumption ceases, which is a fixed and definite time.

We have examined the other errors alleged, and think they are untenable. The judgment is, therefore, affirmed.

SCOTT, STILES, ANDERS and HOYT, JJ., concur.

6	494
10	12
33	824
38	877

[No. 740. Decided June 10, 1893.]

FIRST NATIONAL BANK OF ABERDEEN, *Appellant*, v. H. H.
CARTER, *Respondent*.

CHATTEL MORTGAGES—POSSESSION OF MORTGAGEE—ATTACHMENT
BY OTHER CREDITORS—PRIORITIES.

Where a chattel mortgage on a stock of goods is given to a *bona fide* creditor, who immediately takes possession, and, placing an agent in charge thereof, proceeds to the county seat to file the mortgage for record, the levy of an attachment, subsequent to the execution of the mortgage, but prior to its filing for record, will not give the attaching creditor any prior rights, although he may have had no notice of the mortgage until the sheriff was notified at the time of making the levy.

Appeal from Superior Court, Chehalis County.

Linn, Bridges & McKinley, for appellant.

Doolittle & Fogg, Charles O. Bates, and J. C. Cross (Jabez Dickey, of counsel), for respondent.

The opinion of the court was delivered by

SCOTT, J.—Plaintiff brought this action to recover possession of certain personal property of the defendant which had been seized by him as sheriff under writs of attachment issued against the property of one David E. Dunbar. Said Dunbar had been carrying on a grocery business at Aberdeen, and had become indebted to various parties, among whom were the plaintiffs in the suits wherein said writs of attachment were issued and the plaintiff in this action. The plaintiff had loaned money to said Dunbar at various times while he was conducting said business, with the understanding that Dunbar would give the bank security therefor whenever called upon to do so. The plaintiff's rights in this action are based upon a chattel mortgage given by Dunbar to secure said indebtedness. This mortgage was

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executed upon the 21st day of September, 1891, and it was provided therein that the mortgagee should take immediate possession of the property and sell the same, and apply the proceeds in payment of the mortgagor's indebtedness to the plaintiff. The mortgage was executed at 7:45 o'clock Monday morning. One Hays, the plaintiff's cashier, went with Dunbar, immediately, to the store where the property was situated, where, in the presence of the clerks, the property was turned over to Hays, and said Hays placed one Warren, one of the clerks, in charge of the store, temporarily, while Hays proceeded immediately to Montesano, the county seat, to put the mortgage upon record. The mortgage was filed for record at 10:10 in the forenoon of the same day. A levy was made under the writs in question after said chattel mortgage had been executed, and after Hays had so taken possession of the property for the bank, but before the mortgage was filed for record. There was some testimony to show that, when the officer who made the seizure under the writs of attachment entered the store with the writs to make the levy, he was informed that the property was then in the possession of the plaintiff, and that said plaintiff claimed the same under and by virtue of a chattel mortgage given by Dunbar to the plaintiff. A verdict was rendered for the defendant, and the plaintiff appealed.

We are of the opinion that if Hays, the plaintiff's cashier, upon receiving the mortgage, did go to the store, and announce to the clerks and such other persons as were present that he had taken possession thereof for the plaintiff under the mortgage, and put one of the clerks in charge of said property temporarily, while he proceeded with diligence to place the mortgage upon record, and if, when the officer appeared, and announced his intention of taking the goods under the writs of attachment against Dunbar, he was then and there informed that said property was in the

plaintiff's possession, under and by virtue of such chattel mortgage, such acts were sufficient to maintain the plaintiff's rights, at least temporarily, while it was proceeding diligently in the premises; and consequently the court was in error in instructing the jury that the notice to the sheriff was not sufficient, but that there must have been a notice given to the attachment creditors prior to the time the writs of attachment were issued and placed in the hands of the sheriff. *Stewart v. Smith*, 60 Iowa, 275 (14 N. W. Rep. 310; *Tucker v. Tilton*, 55 N. H. 223; *Young v. Walker*, 12 N. H. 502. Under the plaintiff's proof, its claim was a meritorious one, as much so as were the claims of the plaintiffs in the attachment suits, and it had a right to obtain security therefor, and Dunbar had a right to prefer the bank in giving security, the claim being a *bona fide* one, and the parties acting in good faith.

For these reasons the judgment of the superior court must be reversed, and the cause remanded.

DUNBAR, C. J., and STILES, ANDERS and HOYT, JJ., concur.

6 496
9 198
38* 974
37* 296

[No. 955. Decided June 14, 1893.]

THE STATE OF WASHINGTON, *on the relation of John W. Stearns*, v. ANDREW H. SMITH.

SUPREME COURT—MANDAMUS AS TO STATE OFFICERS—REGENT OF AGRICULTURAL COLLEGE.

A member of the board of regents of the agricultural college is not a state officer over whom the supreme court has original jurisdiction in *mandamus* proceedings, within the meaning of §4, art. 4, of the constitution. (DUNBAR, C. J., dissents.)

Original Application for Mandamus.

June, 1898.] Opinion of the Court—STILES, J.

James A. Haight, for relator.

Calkins & Shackelford, for respondent.

The opinion of the court was delivered by

STILES, J.—Under a showing of an emergency the relator in this proceeding obtained from this court an alternative writ of *mandamus* requiring respondent, as ex-treasurer of the board of regents of the agricultural college, to turn over certain moneys alleged to be in his possession to his successor in office, the relator. The respondent has demurred to the alternative writ on the ground that this court has no jurisdiction of the proceeding, and we find upon a more careful examination of the constitution of the state that he is right.

Sec. 4, art. 4, of the constitution confers upon this court original jurisdiction in *mandamus* as to all "state" officers, and the only question to be determined upon the demurrer is as to whether the respondent is a state officer within the meaning of the section mentioned. As a general rule the term state officer is only applied to those superior executive officers who constitute the heads of the executive departments of a state. The constitution does not in terms say who the state officers shall be, but it is noticeable that the third, or executive, article, which is devoted entirely to these superior officers of the state, closes with § 25, wherein it is first provided that no person excepting a citizen of the United States and a qualified elector of this state shall be eligible to hold any *state* office, and also that the compensation for *state* officers shall not be increased or diminished during the term for which they have been elected. As used in this connection, the framers of the constitution evidently had in mind only the officers for which art. 3 provided.

Again, in art. 5, of impeachment, the second section pro-

vides that the governor and other "state" and judicial officers, except judges and justices of courts not of record, shall be liable to impeachment. And the third section provides that all officers not liable to impeachment shall be subject to removal for malfeasance in office in such manner as may be provided by law. If "state officers" should be taken to include all officers who have to do with the state's business, officers of all grades would be subject to removal by impeachment only, and there would be no use of § 3. But it is a matter of general as well as legal knowledge that impeachments do not lie against any but the superior officers of a state, and that it is usually limited to the executive and to the judiciary, and this was the intention in this article. There has been much conflict of opinion among courts as to whether *mandamus* would lie in any case against the superior executive officers of a state, but there never has been any question but that the writ runs against the greater number of officials who, while they are doubtless officers, and may be said to be in a sense state officers, in that they transact business of a state, are always subject to control by the courts through the writ of *mandamus*.

With these obvious meanings of the term "state officer" in every other place where it is used in the constitution, why should we give it a different meaning when our own jurisdiction is concerned? The purpose of the constitution in setting up a supreme court was to provide a court for appeals; but it was deemed that cases might arise where the judicial power should be exercised against one of the chief governmental officers of the state in matters of such public importance that the cases should be at once passed upon by the supreme court, and therefore this power of *mandamus* and *quo warranto* was conferred. But it was never intended that this court should be a general resort in proceedings to set in motion the hundreds of minor officers with whom

June, 1898.]

Syllabus.

citizens or other officers may have business. In this case the matter can be better prosecuted in one of the superior courts than here, and it should have been commenced there.

The demurrer is sustained, and the writ discharged.

HOYT, SCOTT and ANDERS, JJ., concur.

DUNBAR, C. J. (*dissenting*).—I am unable to agree with the majority opinion in this case. If I read the opinion correctly, the court decides that this class of officers are state officers, but not state officers in the sense in which the term is used in § 4, art. 4, of the state constitution. I do not think the language of the constitution justifies the construction of the majority. There is no limitation expressed in the language, or any which in my judgment can be implied. The language is sweeping and comprehensive. It is that “the supreme court shall have original jurisdiction in *habeas corpus* and *quo warranto* and *mandamus* as to all state officers.” There is no distinction made between the superior and inferior state officers, and when it is conceded that the officer in question is a state officer it seems to me that the argument is at an end, and that the language of the constitution is not susceptible of construction. The demurrer should be overruled.

[No. 847. Decided June 15, 1898.]

THE COMMERCIAL BANK OF VANCOUVER, *Respondent*, v.
ELI SCOTT AND MARTHA E. SCOTT, *Appellants*.

PROMISSORY NOTE GIVEN BY HUSBAND—LIABILITY OF WIFE—
COMMUNITY DEBT.

A wife cannot be joined as a party defendant to a suit upon a promissory note executed by the husband alone, although the complaint may allege that the note was given for a community debt. (SCOTT and HOYT, JJ., dissent.)

6	499
q10	245
32*	820
34*	434
38*	1087
6	499
15	396

Appeal from Superior Court, Clarke County.

Miller & Stapleton, for appellants.

N. H. Bloomfield, and *W. Byron Daniels*, for respondent.

The opinion of the court was delivered by

ANDERS, J.—This action was brought to enforce the payment of a promissory note made and delivered by Eli Scott, the husband of the appellant, to one Durand, and by him endorsed and transferred, before maturity, and for a valuable consideration, to the respondent.

In addition to the ordinary allegations in such cases, the complaint avers that the plaintiff purchased the note with full knowledge that the defendants were husband and wife at that time, and also at the time of the execution and delivery of the same by the said Eli Scott to the said payee; that the said note was given by the said defendant Eli Scott to the said Durand, in payment of certain of the capital stock of the corporation known as the Durand Organ Company, of Portland, Oregon, which capital stock was in shares issued to the defendants, and was received and held by them as their community personal property; that the defendants at all the times mentioned in the complaint were and still are husband and wife, and that the said wife became the owner of a community interest in said shares of capital stock, and together with her husband received dividends thereon; and that the debt of the defendants as evidenced by said note was and is their community debt. The appellant interposed a demurrer to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action against her. Her demurrer was overruled by the court and exception taken and allowed.

She thereupon filed her separate answer admitting that

the said stock was received by the said Eli Scott and retained by him, but denying that any dividends had been received thereon, and that the debt of said note became a community debt, and setting up as a further answer and defense that said note was procured through misrepresentation, in that said share of stock was of no value for the reason that the said Durand Organ Company was in fact insolvent, though falsely represented to be solvent, and that there was therefore an entire want of consideration for said note. A demurrer to this answer was sustained by the court, whereupon it was agreed by and between counsel for plaintiff and defendants that the answer of Eli Scott be withdrawn and judgment taken against him as demanded in the complaint, subject to his right of appeal; and the defendant, Martha E. Scott, refusing to answer further, judgment was entered against her, from which she appealed.

There are but two questions presented for our consideration on this appeal. The first is, did the court err in overruling appellant's demurrer to the complaint? And the second is, did the court err in sustaining the demurrer to appellant's separate answer? And if the first question be answered in the affirmative, a determination of the second will become unnecessary.

The position assumed by the respondent in this case is peculiar, if not unique. As indorsee of a negotiable promissory note it sues the maker and another person not a party to the contract or in any way referred to in the instrument, and demands judgment against both. While citing no precedents for such proceeding, it claims a right of action against the appellant because it alleges in effect in its complaint that the consideration for which the note was given inured by some occult operation of law to her benefit, and that she therefore became equally liable with her husband. But how any or all of the allegations in the complaint as to the original consideration for the note

could be construed so as to make the appellant liable as a party to it, contrary to the very terms of the instrument itself, we are utterly unable to comprehend. The respondent did not bring its action upon the original indebtedness of Eli Scott and the appellant, or either of them, for the stock sold by Durand, nor was it in a position to do so. That was a matter of no concern to the respondent. It bought a note made by Eli Scott, presumably for a money consideration, and brought its action upon it, and is entitled to judgment for the amount due thereon against him only. As against appellant the complaint fails to state a cause of action, and the judgment must therefore be reversed, and the cause remanded to the lower court with directions to sustain the demurrer.

DUNBAR, C. J., and STILES, J., concur.

SCOTT, J. (*dissenting*).—I am unable to concur in the opinion rendered in this case, logical as it reads. It must be borne in mind that we have a system of property rights peculiar to ourselves, and for that reason some of the rules generally applicable to suits on negotiable paper well settled elsewhere cannot be applied here with safety. Our laws recognize authority in the husband to create debts on the part of the community. The wife may also create debts for which the community estate is liable, at least for some purposes, although she may not have such power generally. The husband can contract with reference to his separate property and create debts in its acquisition, management and disposition which may probably be a charge upon the community personal property because of his power to dispose of the same, but could not be made a charge upon any part of the community real estate prior to a dissolution of the community, except by the act of both of its members, unless for improvement thereon under the provision in § 1400, Gen. Stat., and it may be with the

June, 1893.]

Dissenting Opinion — SCOTT, J.

possible further exception of such real estate as he holds the record title to, by force of the act of the legislature approved March 9, 1891 (Laws 1891, p. 368), where the wife has not given the notice prescribed by the act. The wife may also contract and create debts with reference to her separate property which could not be made a charge upon any part of the community property prior to a dissolution of the community unless in such cases as would come under the act last mentioned.

Such being the law, it may be of vital interest to a creditor to know whether or not an obligation which he holds contracted by one of the parties is a separate debt or a community debt, and its community character can only be established in an action to which both members of the community are parties. No one will contend that the wife can be concluded upon this question, it seems to me, without an opportunity to be heard, as such a rule would be destructive of the entire community system. This question was brought to the attention of the territorial supreme court in *Andrews v. Andrews*, 3 Wash. T. 286, 14 Pac. Rep. 68, and, while not decided, it was said there that —

“We see no way for a creditor to get a judgment lien conclusively operative upon such real estate, except as the result of an action or proceeding to which both husband and wife were parties, and in which the community character of the debt is admitted or in issue. It may be that he could come into court in the first instance, alleging the community character of the debt, and obtain a judgment as for a community debt.”

Such an action upon an obligation executed by one of the parties only would be something of an anomaly, but *the wife is in a sense a party to every community debt, even though in the shape of a note given by the husband, and the right to sue both members of the community thereon is rendered necessary by the situation.* If this cannot be done, when can or should the character of such a debt be deter-

mined so as to be binding upon all the parties interested. It may be said that upon the issuance of an execution upon a judgment obtained against the husband, and a levy upon community real estate thereunder, the wife can come in and resist a sale of the property, or show that the judgment was not obtained upon a community debt. But there are serious objections against limiting the method to such a proceeding. The wife, through absence or otherwise, might have no knowledge of the levy, and in such a case must the execution creditor go ahead at his peril, and must the purchaser under such an execution sale take the chances of having to defend an action which the wife may thereafter bring, and of losing the property if the debt upon which the judgment was obtained is shown not to have been a community debt. If so it is evident that real estate under such circumstances would bring but a very small proportion of its value.

Or, will it be contended that upon the issuance of an execution, and its levy upon community real estate, the creditor should bring a suit or proceeding in aid of the execution against the community, to establish the community character of the debt? If so, he might as well bring the action originally against the community, and save the delay and expense of a second suit. Any objection that can be raised to joining the wife in the suit in the first instance, in an action upon a note given by the husband for a community debt, would apply with equal force to a subsequent proceeding against the wife to determine the community character of that same debt, in the form of a judgment against the husband.

Our laws relating to proceedings against husband and wife for the collection of debts and the enforcement of obligations are yet very much unsettled. The subject is a complicated one, with innumerable intricate bearings, and a solution thereof compatible with the business interests of

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the country, and at the same time affording protection to the husband and wife community, is of the greatest importance. It seems to me the decision rendered in this case strikes hard at the foundation of the commercial interests of the people.

There are many questions affecting community rights and obligations which will likely be presented for determination, some of which are at least indirectly involved in this action. Can a creditor in enforcing the collection of a community debt proceed against the property of the community or the separate property of either of its members indiscriminately.

In *Oregon Improvement Co. v. Sagmeister*, 4 Wash. 710 (30 Pac. Rep. 1058), we held that debts contracted by the husband are *prima facie* community debts. But this presumption upon a negotiable note should not be allowed to grow into a conclusive one as against the wife, in whosoever hands it may be. Although if in the hands of a holder in good faith without notice the wife would probably be concluded as to all defenses going to a misrepresentation of the consideration therefor by the party originally obtaining the note, as this should follow from the fact that the husband had the right to create the debt against the community for community purposes. But the wife must certainly have the right to be heard upon the proposition as to its being a community debt in fact.

The rule that the consideration for a negotiable note can not be inquired into as against a subsequent holder in good faith should only conclusively operate as against the individual executing the note. But the creditor should be permitted to show that it is a community debt, and when that fact is established, the rule should operate against the community as to any further questions going to the consideration, for it can then be said that the community executed it. It will not do to hold that the presumption, that a

negotiable note executed by the husband creates a debt against the community, is an absolute one, as it would vest power in the husband to indirectly dispose of the entire community estate, both real and personal. One of the main purposes of the law is to prevent this. In holding that the consideration cannot be inquired into in favor of the maker against a subsequent holder in good faith, the creditor is given all the protection that the common law gave him. The rule was invoked for his benefit and to further commercial interests, and would not militate against a rule permitting him to establish the fact that there was another party liable upon that same note not patent upon its face. This would be extending the doctrine, instead of limiting it.

The decision of all such questions affecting the community must be approached with great care, having regard for the welfare of the community, and for the commercial interests of the people, and each question as it arises must necessarily be considered with reference to its bearing upon others, or interminable confusion and hardship will result. With great deference to the straightforward, apparently simple holding in this case, it seems to me it involves much more than is at first sight visible. I think the plaintiff in this case should have the right to have the character of its claim settled in this action, and to have a judgment against all the parties liable thereon. If it is to be held that in this state a note executed by the husband is conclusively his separate debt only, most disastrous consequences will flow from it, as the great bulk of the property held in the state is undoubtedly community property, and in many cases, as in this one, the creditor would not be in a position to sue upon the original debt. The commercial value of negotiable paper would be most seriously impaired thereby. On the other hand, if such a note is to be held conclusively a community debt, then there is an end to the supposed

June, 1893.] Opinion of the Court—DUNBAR, C. J.

protection afforded the wife by the community laws, and a long stride backward has been taken in the relations of husband and wife.

Hoyt, J., concurs.

[No. 835. Decided June 15, 1893.]

LOTTIE P. ABBOTT, *Respondent*, v. JAMES WETHERBY, *Administrator of the Estate of George F. Abbott, deceased, Appellant*.

COMMUNITY PROPERTY—EARNINGS OF WIFE—GIFT BY HUSBAND TO WIFE.

Money saved by a wife from the funds given her by her husband for household expenses does not thereby lose its community character and become her separate property.

A statement by a husband that his wife had selected certain lots; that she had always worked hard and earned a great deal of money, and that he intended the land as a home for her, cannot be construed as creating a separate estate therein by gift, when the land had been purchased with community funds.

Appeal from Superior Court, King County.

W. Lair Hill, and Gilliam & Hill, for appellant.

Fred H. Peterson, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—Respondent and George F. Abbott were married in the State of Ohio, in 1852, and have ever since lived together as husband and wife until the death of Abbott in the State of Washington, in 1890. At the time of the marriage respondent had no property, at least the testimony convinces us that she had none worthy of consideration; none which has been the source of any accumu-

6	507
9	457
33*	1070
37*	873
6	507
13	80
6	507
17	496
6	507
18	310
6	507
28	175
128	176

lations. As husband and wife, respondent and Abbott lived together in several different states, and with varying fortunes, until in 1883, when Abbott came to Washington, respondent following in due course of time, since which time this state has been her home, and was the home of her husband until he died. They had but little means when they came to Washington. The property in controversy consists of lots 5 and 6 in block 1, of Burke's Second Addition to the city of Seattle. On July 2, 1883, George F. Abbott took a bond for a deed from Lyman M. Wood for lot 6, and the south half of lot 5, and paid thereon sixty dollars, the price agreed to be paid being \$275, the remainder of which was paid in small payments. A deed was executed and delivered to respondent by Lyman M. Wood and wife in pursuance of this bond for a deed on the 28th day of April, 1887, for the consideration of \$450. The north half of lot 5 was conveyed to George F. Abbott by Lyman M. Wood by deed dated October 11, 1888, expressing a consideration of \$250. August 22, 1889, George F. Abbott and respondent executed and delivered to Cassa Osgood, without consideration, a deed purporting to convey to Mrs. Osgood the last described tract, under an agreement between Mrs. Abbott and Mrs. Osgood that the latter should re-convey this land to the former without consideration, whenever the former should request it. In pursuance of this arrangement Mrs. Osgood, on the 29th day of March, 1890, re-conveyed this tract to respondent. At the time of the delivery of the deed from Mr. and Mrs. Abbott to Mrs. Osgood, Mrs. Abbott furnished Mrs. Osgood \$100 to pay Mr. Abbott as a part of the consideration. After the conveyance of lot 6 to respondent, she and her husband deeded to the First Baptist Church a portion of lot 6. Afterward they entered into an agreement with the First Baptist Church to exchange for the property in lot 6, deeded to it, lot 1, in block 6, of Jackson Street Ad-

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dition to the city of Seattle, and did afterwards make such exchange. The property exchanged with the church under said agreement, and which constituted the consideration for said conveyance, stood in the name of George F. Abbott. In July, 1888, the appellant and George F. Abbott entered into a copartnership as contractors and builders, and continued in that relation until about January, 1889. Being unable to agree upon a settlement of their copartnership affairs, they submitted their differences to arbitration, which resulted in a judgment in favor of the appellant and against Mr. Abbott in the sum of \$350.63, and \$14 costs, a copy of which judgment was filed and recorded in the office of the county auditor of said King county, and this suit was instituted by respondent against the appellant as administrator of the estate of the said George F. Abbott, deceased, to prevent him from administering upon the property above described, and to remove the cloud from the title to said land which she alleges the recorded judgment to be; so that it will be seen that it is necessary to determine at the outset whether the property in dispute is community property or the separate property of the respondent.

The debt upon which the judgment was based was contracted in the ordinary course of the husband's business for the benefit of the community, and is therefore a community debt. *Oregon Improvement Co. v. Sagmeister*, 4 Wash. 710 (30 Pac. Rep. 1058). Hence if the property was community property it was properly listed by the administrator, and should be made to respond to the community debt.

We must look to our statutes alone to determine what constitutes separate property. Sec. 1398, Gen. Stat., provides what property is the separate property of the wife, viz., the property and pecuniary rights of every married woman at the time of her marriage and afterwards acquired

by gift, devise or inheritance, with the issues and profits thereof. Sec. 1399 provides that all other property is community property. As we have already seen, the respondent had none of this property at the time of her marriage; she has not acquired it by devise or inheritance, and it follows that, if she has not acquired it by gift, under the provisions of § 1399 it is community property. We are unable to find anything in the record even tending to support a conclusion that the money with which the payment for this land was made was given to the respondent. The husband was industrious and so was the wife, the testimony showing that the labor of both contributed to the fund with which this property was purchased; that as members of the community they were both working for the interests of the community. The respondent's idea of a gift is illustrated by her testimony. When asked how she obtained certain money which she claims to have paid for the land, she replied:

"I obtained it in this way: He would give me money for the house, and whatever was over, was mine. He gave me money to purchase things; I used to spend part of what he gave me, and the rest of it was mine; and doing that, I very soon accumulated money."

This surplus, respondent says, she loaned to her husband when he was in need of a little ready money, and as he did not pay it back to her she takes credit for the amount which her husband paid on the purchase price on the land in question. This is, to say the least, a novel and ingenious method of attempting to convert community property into separate property. Counsel for the respondent seems to think that his client is entitled to great credit on account of her economical habits, and for being able to save something out of the bountiful provision made by the husband for the household expenses; and no doubt she should have, if the economy had been practiced in the interests of the

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community which was furnishing the funds; but in this instance the beneficiary was a stranger to the community; and the encouragement of a practice working such results might lead to habits of economy so rigid that the comfort of the community would be a consideration secondary to that of the thrifty condition of the separate estate. Ordinarily, it would seem that the overplus furnished by any particular fund to meet any expenses should be returned to the fund which furnished it. We see no good reason for upsetting this well established principle in law and morals in this case. So far as the transaction with Mrs. Osgood, in which the record title was transferred from Abbott to his wife, is concerned, the same principle obtains. It was the community funds which were, through a deception practiced on Abbott, paid to him, and which it may be fairly presumed was by him again furnished to his wife to meet the current expenses of the community. And, according to respondent's own testimony, the whole object of that transaction was not to change the property from community to separate property, but to get it into such a condition that her husband could not dispose of it, which she feared he would do, and by so doing secure it for the use of the community. This is the theory which places the respondent in the most favorable light in her dealings with her husband, and the one on which we believe she acted.

It is true that Abbott stated to Mrs. Woolen and Mrs. Osgood that his wife had selected these lots, and that she had always worked hard and earned a great deal of money, and that he intended the land as a home for her; but such expressions are common with husbands who have not a thought of separate property. Most husbands are considerate enough of their wives to allow them to make a selection of their residence, and to accord to them the credit of having worked hard and helped to accumulate what they possess; but such expressions cannot be construed either as

a gift, in the sense of creating a separate estate, or as a payment for money had and received. Indeed it is hard to tell what the theory of the respondent in this case is, whether her claim is based upon a gift, or upon a debt. If upon a gift, the evidence of a gift must be clear, and it must be apparent that the husband intended to divest the community of all rights, and to set the property apart to the separate use of the wife. *Evans v. Covington*, 70 Ala. 440. If upon a debt, that transaction must be as clearly proven.

It is, however, claimed that a large portion of the funds which paid for these lots was earned by the wife, and that such earnings were her separate property under the provisions of the statute. The statute, in addition to the property described in § 1398, provides a way in which a married woman can obtain separate estate. Section 1403 provides that the earnings and accumulations of the wife and of her minor children living with her, or in her custody, while she is living separate from her husband, are the separate property of the wife. It is true that § 1402 provides that the wife may receive the wages of her personal labor; but these sections must be construed together, and thus construed we must conclude that her earnings only become her separate property while she is living separate from her husband. Any other construction would render meaningless § 1403, for if § 1402 created her earnings into a separate estate the enactment of § 1403 would have been absolutely useless, as all its provisions under this construction are embraced in § 1402. And the same reason would apply to § 480, Code Proc. While the personal earnings of a wife are exempt, it must be construed to be a statute of exemptions, and in no sense defines separate property. The statute seems to definitely distinguish the rights acquired by wives who are living with their husbands, from the rights acquired by wives who are living separate from their husbands.

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The case of *Carter v. Worthington*, 2 South. Rep. 516, which is cited and relied upon by respondent, is not a parallel case with the one at bar. In that case a married woman, who had been conducting a millinery establishment before her marriage, continued the business for many years after marriage with her husband's consent, and took a conveyance of land in payment of an account for goods sold the grantor. *Held*, That such goods being purchased with the profits of the business were to be considered as accretions to her separate estate, which had already accumulated, and that the land so purchased could not be subjected to the payment of a judgment against her husband on a debt incurred before the sale of the goods to the grantor. There is no question of accretions from respondent's estate here. There was in reality no conducting of any distinct business, the husband and wife were both industrious and both no doubt added something by their labor to the common fund; the wife sometimes kept boarders, but it appears that the house and supplies were furnished by money earned by the husband. They were both doing their share; doing what is common for husbands and wives to do to prosper and to accumulate a competency for the community. It is the duty of each spouse to contribute his or her industry, energy and intelligence to the community; and it would encourage a sorry state of affairs in our domestic relations, if each one of the spouses were allowed, as seems to us to be attempted in this case, to charge the community with all the expenses of the living and expenses of the business, and credit the separate estate with the gross earnings.

Our conclusion is that the property listed by the administrator was properly listed as community property; and the judgment is, therefore, reversed, and the cause remanded to the lower court with instructions to dismiss the same at respondent's cost.

HOYT, SCOTT, STILES and ANDERS, JJ., concur.

[No. 854. Decided June 16, 1893.]

SAMUEL WOLFF, *Respondent*, v. M. J. MADDEN, JOSHUA GREEN *et al.*, *Appellants*.

PARTNERSHIP—LIABILITY OF INCOMING PARTNER.

An incoming partner, in the absence of some agreement assuming past indebtedness, becomes liable only for the future, and not for the preëxisting, debts of the partnership.

Appeal from Superior Court, Pierce County.

Strudwick & Peters, for appellant Joshua Green.

The opinion of the court was delivered by

DUNBAR, C. J.—It is not necessary for us to notice appellant's objections to respondent's contention that the relation assumed by appellant towards the Midland Lumber Company was that of an incoming partner, for assuming, for the purposes of this decision, that the jury correctly found upon that proposition, we are unable to find anything in the record which would bind him as an incoming partner to pay debts of the partnership which were contracted prior to his connection with the partnership. It would be a useless task for this court to discuss the question of liability by "holding out," when the undisputed testimony as well as the conceded fact is that, at the time the order was given the Midland Lumber Company, and accepted by it, appellant had no connection whatever with said company, and there is no proof whatever tending to show, and none offered for the purpose of showing, that the credit given was given on the strength of appellant's relation to the company, for the order was given on the company on the 4th day of December, and the appellant had no relation with the company until the 26th day of January following. And none of the witnesses who testified in relation to con-

June, 1893.] Opinion of the Court—DUNBAR, C. J.

versations had with appellant concerning his connection with the company fixed the time for such conversation prior to that time. Considered, then, as an incoming partner, is he responsible for preëxisting debts of the company? It is a universally conceded doctrine that when a new member is admitted to a firm he becomes one of the firm for the future and not for the past. There is not only no presumption that the incoming partner assumes preëxisting debts, but the presumption is that he does not. Without citing authorities, which are uniform on this subject, the rule seems to be briefly and concisely stated by 1 Lindley on Partnerships, p. 208, as follows:

“In order to render an incoming partner liable to the creditors of the old firm there must be some agreement, express or tacit, to that effect entered into between him and the creditors, and founded on some sufficient consideration. If there be any such agreement the incoming partner will be bound by it, but his liabilities in respect of the old debts will attach by virtue of the new agreement and not by reason of his having become a partner.”

In this case there is no showing of anything that was said or done by appellant that could reasonably be construed into a promise to become liable for the debt sued upon. The testimony of himself and the creditors proves no more than that appellant, as manager for the company, recognized the company's indebtedness. He could do no less than this, as it was a fact of which he was no doubt cognizant, but this is a different proposition entirely from acknowledging his personal liability, and even if there could be any such construction placed upon his acts or words there is no showing of, or attempt to show, any consideration for the promise. In our judgment the testimony offered by plaintiff was utterly insufficient to sustain the judgment, and defendant's motion for a non-suit should have been granted.

With this view of the case it is not necessary to discuss the errors alleged in the admission of testimony, and in giving and refusing instructions. The judgment is reversed, and the cause remanded to the lower court with instructions to grant defendant's motion for a non-suit as prayed for.

STILES, HOYT, SCOTT and ANDERS, JJ., concur.

[No. 813. Decided June 20, 1893.]

MOSES HYMAN *et al.*, *Appellants*, v. A. L. BARMON *et al.*,
Respondents.

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCE—NOTICE
OF FRAUDULENT INTENT—ATTORNEY AND CLIENT.

Where a debtor in failing circumstances confesses judgment in favor of certain creditors, who have knowledge of his condition, after the intention to make an assignment had been fully formed in his mind, and follows the confessions of judgment with an assignment for the benefit of creditors, such judgment liens are voidable, and the assignee, or a receiver appointed by the court, is entitled to the possession of all the debtor's property for the purpose of making *pro rata* distribution among all the *bona fide* creditors.

A creditor is chargeable with the knowledge of his attorney that a debtor intends to make an assignment at the time he confesses judgment in favor of the creditor.

Appeal from Superior Court, Spokane County.

Forster & Wakefield, for appellants.

Turner, Graves & McKinstry, and *Jones, Voorhees & Stephens*, for respondents.

The opinion of the court was delivered by

STILES, J.—In several recent cases this court has construed the act of 1890, to secure to creditors the benefit of

June, 1898.] Opinion of the Court—STILES, J.

estates of insolvent debtors, to be an insolvent law, and one of the principal reasons for that construction, as against the holding that it was a mere regulation of common law assignments, is that it contains a provision whereby a debtor may be absolutely discharged of all his debts. For this reason, if for no other, many cases arising under statutory provisions similar to that in our law, which provide that every assignment for the benefit of creditors shall be void unless it be made for the benefit of all creditors alike, have no application, because they merely regulate the disposal of the debtor's property, but do not discharge him. *Cross v. Curstens* (Ohio), 31 N. E. Rep. 506. Measured by this statute, wherever there has been an assignment in which the debtor has sought to bring himself within the provisions of this act, the first duty of the court, in cases like the present, is to determine whether there has been an assignment, and whether the conveyances previously made by the assignor to his creditors were made for the purpose of avoiding the requirement of this law that all his property be distributed ratably among his creditors. Judged by this rule, and by the decision of this court in *Benham v. Ham*, 5 Wash. 128 (31 Pac. Rep. 459), which the respondents invoke in their behalf, we find it admitted that there has been an assignment, and we also find that the several confessions of judgment were made by Barmon after the intention had been fully formed in his mind to make an assignment, and for the purpose of preferring sundry creditors, several of whom were his immediate relatives. It was testified that shortly before the judgments were confessed the respondent told a witness that if any of his creditors pushed him he should certainly make an assignment in order that all might share alike. Barmon does not deny this, and even if he did, his denial would have but very little weight with us since from the record in the case we find him to be a witness wholly un-

worthy of belief in any matter which is not an admission against himself. We shall not pursue the evidence further upon this point. There is abundance of it to establish a very strong presumption that Barmon's intention in making his statements to the attorney of appellants was simply to gain time within which he could enable the creditors for whom he confessed judgment to prefer themselves, and follow the matter up with his voluntary assignment.

In this state of facts, following the leading authority cited by the respondents themselves, *Preston v. Spaulding*, 120 Ill. 208 (10 N. E. Rep. 903), we think we are justified in holding these judgment liens void, although admitting that it is not clearly shown that the judgment creditors had notice of the intended assignment. When courts go outside of the limits of a deed of assignment to bring in property transferred before the date of the deed, it is upon the theory that the law will not permit an insolvent debtor who has determined to apply for the benefit of the act, by subterfuge, to violate the positive provisions of the first section, which denounces preferences. In some jurisdictions the statute has been so construed as to avoid both the preferential conveyance and the assignment; but the better rule, and the one we have adopted, is to let the beneficial, lawful act stand, and avoid those which are unlawful. Now, if it is unlawful for the debtor to contrive a fraudulent scheme by which one creditor may be paid in full and another be left to share in the depleted estate, it must be unlawful for the creditors who are preferred to take the benefit of his action. Where no assignment is made the debtor is not discharged from his other debts; and where security is given without contemplation of an assignment, there is no contrivance or scheme to evade the law, and therefore no violation of it. But to hold that a debtor owing fifteen thousand dollars of assets, may deliberately create a trust or charge upon ten thousand in favor

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of that much of his indebtedness, and then, with the remaining five thousand, go into the superior court and be discharged from all further liability, would be to render this statute worthless. The complete dominion of a debtor over his property continues so long as he is managing and disposing of it in good faith; but when he begins to deal fraudulently with it, creditors may seize it by attachment, or if he brings it within the reach of the courts by an assignment, equity will seize the whole of it, and avoid his fraudulent acts. *Holt v. Bancroft*, 30 Ala. 193; *Preston v. Spaulding*, *supra*; *First National Bank v. Bard*, 13 N. Y. Supp. 688; *Abegg v. Schwab*, 7 N. Y. Supp. 46; *Backhaus v. Sleeper*, 66 Wis. 68 (27 N. W. Rep. 409); *Berry v. Cutts*, 42 Me. 445; *Sartwell v. North*, 144 Mass. 188 (10 N. E. Rep. 824).

It may be doubted whether those of Barmor's creditors who were not his relatives actually knew anything about his intention to make an assignment at the time they put their claims into the hands of their attorneys for prosecution, but the fact is that those attorneys had been the attorneys for Barmon, and were consulted by him in reference to his indebtedness to plaintiffs in this case when they were seeking to obtain from him a showing from his books as to his condition. They knew that he could not pay his debts, and that he was being pressed on all sides. In this condition of things six different claims all came into their hands about the same time for prosecution against Barmon. Suits were commenced, and without any solicitation on the part of the attorneys Barmon proposed to confess judgment in favor of each creditor. Six entirely separate and independent creditors at the same time proceeded to the same law office, and directed suits to be commenced; and those suits were barely commenced when the debtor voluntarily proposed to confess judgments, which judgments were more than sufficient to cover every dollar's worth of

property which he had, and execution at once followed. While things were in this condition, the debtor, without any property whatever which was not already in the hands of the sheriff, employed other attorneys to prepare and file for him a general assignment. Three of the preferred creditors were relatives, one of them a sister, and two brothers-in-law. In addition to which the brother and father of the insolvent had been preferred by the delivery of specific property about the same time.

In *Kellogg v. Root*, 23 Fed. Rep. 525, it was held that when an insolvent, at his own instance and convenience, voluntarily gave some of his creditors security it was at once a suspicious circumstance, and if followed within a short time by an assignment, the conclusion would be justified, in the absence of other controlling circumstances, that both were contemplated, and should be deemed in law one transaction, and such securities held void.

The knowledge of attorneys in such a case is the knowledge of the clients. *Sartwell v. North, supra*; *Rogers v. Palmer*, 102 U. S. 263.

The judgment of the superior court was erroneous and must be reversed. The judgment of the court will be that the appellant recover the costs of this action from the respondents, and that the proceeds of Barmon's estate now in the hands of the receiver, after paying the costs of the receivership, be distributed *pro rata* among such of his *bona fide* creditors as may establish their claims to the satisfaction of the court. The assignee not having qualified makes this course proper. So ordered.

DUNBAR, C. J., and HOYT and ANDERS, JJ., concur.

SCOTT, J., concurs in the result.

[No. 822. Decided June 20, 1893.]

THE SPOKANE STREET RAILWAY COMPANY, *Appellant*, v.
 THE CITY OF SPOKANE FALLS, CHARLES F. CLOUGH, M.
 M. SWINGLER AND CITY PARK TRANSIT COMPANY, *Re-*
spondents.

6	521
17	070
6	521
19	531
6	531
440	549

MUNICIPAL CORPORATIONS—FRANCHISE FOR STREET RAILWAY—
 ESTOPPEL—UNAUTHORIZED TRACKS—ABATEMENT AS NUISANCE.

Where a street railway company, under an ordinance granting it a right to lay tracks in certain streets, lays and operates in connection with such system a track upon a street not named in its franchise, the city is estopped to interfere therewith, when it had knowledge thereof through its officers, the tracks, in fact, being laid under the direction of its superintendent of streets, and the company had, for several years, operated its railway thereon without objection, and paid taxes assessed upon the property by the city.

Where a street railway company holds a franchise to operate a cable railway upon certain streets, through compliance with the absolute conditions contained in the grant, but operates a horse railway instead of a cable railway upon one of the streets, the proper course for the city is, not to abate such horse railway as a nuisance, but to take such legal proceedings as will compel the operation of the road by cable instead of by horses.

Although a street railway track constructed without authority may be technically a nuisance, yet where there is no general law of the city declaring such railway a nuisance and authorizing its abatement, the city is not authorized, under a charter provision empowering it "to cause any nuisance to be abated," to tear up such street railway track..

Appeal from Superior Court, Spokane County.

Turner & Graves, and F. T. Post, for appellant.

P. F. Quinn, and W. C. Jones, for respondents.

The opinion of the court was delivered by

STILES, J.—The appellant brought an action against the respondents to prohibit them from interfering with its

street railway upon Division street in the city of Spokane Falls, and the court below sustained a demurrer to the complaint, and dismissed the action. To sustain its right to an injunction, the plaintiff showed that on the 16th day of June, 1886, the city of Spokane Falls, by an ordinance of that date, granted to its assignors the right to lay down, maintain and operate a street railroad upon certain streets, which were named, of which Division street was not one, but in building its road it laid down a portion of its track on Division street and used and operated the same as a portion of its system from some time in 1887 to the time of the commencement of the action, in 1890. The track on Division street was laid under the direction of the superintendent of streets of the city, and was assessed for municipal taxes for each year thereafter. On March 14, 1889, the Spokane Cable Railway Company obtained a similar franchise from the city for the construction, operation and maintenance of a cable railway or railways upon sundry streets, among which was Division street. Among the terms of this second ordinance was one which provided that the grantee therein should have completed and in operation, within the city limits of Spokane Falls, at least two miles of road within six months from the passage of the ordinance, it being understood that the two miles to be completed as aforesaid might embrace that part of a road already commenced under the authority of a third ordinance running to J. M. Thompson; or his assigns, passed June 7, 1888. It was alleged in the complaint that the Spokane Cable Railway Company had in part complied with the terms of its ordinance by the laying down of certain rails, one line of which was on the outside of each of the rails of plaintiff company's original track, this having been done by agreement between the two companies. Subsequently, and before the commencement of this action, the Spokane Cable Railway Company had sold and as-

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signed to the appellant all of its rights under the ordinances granting to it authority to maintain a cable railway in Division street. The Spokane Cable Railway Company had also before this time complied with that portion of its ordinance requiring it to have at least two miles of its road completed within six months from the passage of the ordinance.

Under these circumstances, the city council, on the 18th day of June, 1890, passed a resolution requiring the plaintiff to tear up all of its rails on Division street and cease operating its line of street railway upon said street, and directed the respondent Swingler, as superintendent of streets, in case the command of the resolution was not obeyed, to tear up the rails. And the further allegation is made that this action of the city was taken at the instance of the respondent, the City Park Transit Company, which was claiming some right to construct a street railway on Division street upon the same portion of the street occupied by the appellant's railway, and that this action was to enable it to occupy the street with its railroad. The supplemental complaint showed that, notwithstanding a restraining order issued by the superior court, the respondents had disobeyed the order and destroyed a portion of the appellant's track; that the police officers of the city had protected the City Park Transit Company, its agents and servants, in laying down its track in place of appellant's thus torn up, and that other portions of the track of the appellant were still intact, the respondents, however, threatening to dispose of that in like manner.

In the face of a general demurrer we are required only to look at the complaint to see whether or not it states any ground of action upon its face. In our opinion there is at least one good cause stated.

1. It is a rule that obstructions of this kind acquire no legality from the fact that they are put in place and op-

erated without interference, and that mere time does not cure their illegal character; but in the case of a *quasi* public institution, like a railroad or street railroad, there are some exceptions to this rule. A municipal corporation should not be permitted to stand by and see large amounts of money invested in enterprises of this sort by persons who act under the mistaken view that they have legal authority. In this case the appellant had authority by ordinance to lay down a street railroad upon a number of streets; it mistook its rights and placed a part of its track in a place not designated in the ordinance. Technically, it had no right to put its track where it did, but the complaint shows that the municipal officers, from the mayor down, and including the superintendent of streets, knew that the track was being laid on Division street, and no objection was made, and the superintendent of streets himself directed the method of laying the track upon that street. Subsequently the road was put in operation, and continued to be used for upwards of two years, during which time the corporation made no objection, and from year to year levied and collected taxes upon this very property, and up to this time, so far as the complaint shows, no objection has been made to the operation of a street railroad upon Division street. The only interference which has been undertaken is not one for the purpose of clearing the street of an obstruction, but one to enable another street railroad company to lay down and maintain a track in the same place.

There are two cases which seem to sustain the view that such circumstances would estop a city from claiming that the right to maintain a street railroad on Division street was not properly authorized by it. See *Chicago, etc., R. R. Co. v. City of Joliet*, 79 Ill. 25; *Chicago, etc., R. R. Co. v. People*, 91 Ill. 251. It may be said that the time which had elapsed in those cases was far greater than in this case.

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but it will be noticed that in both the payment of taxes was a ground upon which the estoppel was held to apply. The assessment of taxes is a deliberate and formal matter, and there is no reason why an estoppel should not grow out of one assessment as well as many.

The principal point urged by respondent under this head is, that the city charter provided that contracts should be made only by ordinance, and that, inasmuch as a street railroad franchise is in the nature of a contract, the right to maintain its track could arise in no other way than by express provision of an ordinance. Charter of 1886, § 85. But it is evident from the reading of that entire section that the contracts there intended are those which would bind the city to the payment of money. The general rule would, of course, be that franchises of this kind could not be acquired except by the action of the corporation, which must be taken by ordinance, but the statute in question does not prohibit the courts from declaring an estoppel against the city in other matters in the same manner that they would as against private persons.

2. The appellant, we think, had succeeded to whatever rights the Spokane Cable Railway Company had under ordinance numbered 254, which authorized the maintenance of a cable railway on Division street. But it is said, by the respondents, that the rails laid by the latter company were only a sham, and intended to preëempt the right to maintain a railroad in that place without a compliance with the ordinance; that is, that it was endeavoring by laying rails which could only be used for a horse railroad to keep itself in a position to take advantage of its franchise whenever it saw fit. The weakness of this objection is, that the complaint alleges that the Spokane Cable Railway Company had complied with the only absolute condition there was in the ordinance, and had in operation two miles or more of cable railway within six months from the date of

the ordinance. And there are further allegations going to show that the laying down of the rails, as they were laid, was for the purpose of indicating the future intention of the company to occupy the street, and, as quickly as was reasonably possible, to change the horse railroad into a cable railroad.

But even if these allegations were not a sufficient bar to the city's action, the mere fact that the grantee of a franchise to lay and maintain a cable railway should lay down a street railway not adapted to the use of a cable, but only adapted to use by means of horses, would not constitute the horse railway a nuisance which could be abated by the municipal corporation at its pleasure. In such a case the only proper course would be for the city to take such proceedings as would result in compelling the operation of the road by cable instead of by horses. A franchise of this kind is a contract which it does not lie in the power of either party to abrogate by such summary measures as were taken in this case.

3. The charter of the city of Spokane, § 14, authorized it "to cause any nuisance to be abated." It may be conceded that this clause of the charter would permit the tearing up of a street railroad track in the manner adopted in this case, if the city had put itself in a position to do so. It was held by this court in *Baxter v. Seattle*, 3 Wash. 353 (28 Pac. Rep. 537), that the provisions authorizing a city to prohibit the erection within any prescribed limits of any building constructed of other materials than brick, mortar, stone and iron, and to provide for the removal of the same, were sufficient to justify a general ordinance prohibiting the erection of such buildings, and to authorize their summary removal by the street commissioner under the direction of the council; but in that case there was an ordinance declaring such structures to be nuisances, and that they might be thus removed. But in this case, so far as the

June, 1898.] Opinion of the Court—STILES, J.

complaint shows, there appears to have been no ordinance at all. The city had not acted in the matter. There was a resolution passed by the council, but that resolution was a mere special direction in this particular case. The law contemplates that in all such cases there shall be a general ordinance which shall be a law of the city which it is bound to follow as much as the people are bound to obey. In the absence of an ordinance regulating such matters the city should have resorted to legal proceedings, and not taken in its own hands by force the execution of the decree against a party who had no legal notice of the pendency of the matter. It is very questionable whether, in any such case, where there is a doubt as to whether or not there may not be existing rights in the person whose property is sought to be destroyed, the municipal corporation should proceed with its destruction without resort to a tribunal, which may determine the right of the matter. This was the course taken in *Moore v. Walla Walla*, 2 Wash. T. 184 (2 Pac. Rep. 187). While a well constructed street railroad may be a technical nuisance, if unauthorized, it is not dangerous to either life, health or property, and so long as the courts are open to the determination of such controversies, there is no call for violence or any manner of arbitrary or oppressive action.

Judgment reversed, and cause remanded, with direction to overrule the demurrer.

DUNBAR, C. J., and HOYT and ANDERS, JJ., concur.

6	528
10	684
33*	1074
39*	176
6	528
23	392

[No. 845. Decided June 20, 1893.]

HERBERT ADAMS AND DANIEL FAIRFIELD, *Appellants*,
v. ALFRED L. BLACK, *Respondent*.

COMMUNITY REALTY — DEED OF HUSBAND — WHAT TITLE PASSES.

Where husband and wife are living together, a deed executed by the husband alone will pass no interest in community real estate, although the husband may have represented himself as a single man, and have so recited in the deed.

Appeal from Superior Court, Jefferson County.

Carroll & Rohde, for appellants.

Black & Leaming, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—This is an action to quiet title to the land in controversy. The testimony shows the common source of title to be the deed from Christopher and Minnie A. Semon to George Semon, dated December 26, 1887. On the 4th day of February, 1888, said George Semon, representing himself to be a single man, which representation was also made in the deed, executed and delivered to Thomas J. Corrigan a warranty deed of said property. It is stipulated, however, that at the time of the execution of the deed to Corrigan the said George Semon was in reality a married man, living with his wife. The stipulation in that respect is as follows:

“That on or about September 15, 1886, said George Semon and Ella Semon were united in marriage, and from and after said date have been husband and wife, and at all times have resided together as such, and now are so existing together.”

On February 6, 1888, Corrigan conveyed the land in controversy by warranty deed to appellants, and on March

June, 1893.] Opinion of the Court—DUNBAR, C. J.

10, 1890, George Semon and Ella Semon, his wife, conveyed the same land by general warranty deed to the respondent. Respondent answered denying appellant's title, and alleged affirmatively that the deed from Semon to Corrigan and the deed from Corrigan to appellants constituted a cloud upon his title, and prayed that he be adjudged the owner. On the hearing of the cause the court adjudged the deed from Semon to Corrigan to be a nullity, and that the deed from Corrigan to appellants conveyed no interest in the land sought to be conveyed, and adjudged that the respondent Black was seized of the title and possession of the premises described.

The appellant's contention in this case, it seems to us, is based upon a misconception of what this court decided in *Sadler v. Niesz*, 5 Wash. 182 (31 Pac. Rep. 630). It was not there decided that the legal title to community real estate does not repose in the community, but in that spouse who is named in the title deed as grantee, and that the wife's interest is only an equitable interest, without notice or knowledge of which a purchaser from the husband holding the legal title would acquire the entire estate, legal and equitable as well. That seems to have been the view expressed by the writer of the opinion, but it was not concurred in by a majority of the court, and has never been enunciated as the opinion of this court. The judgment in that case was affirmed by two members of this court expressly on the ground of estoppel, and by one member on the ground that the statute in relation to the disposal of community property does not apply, so far as the public having no knowledge of the legal relation of husband and wife are concerned, where the community relation is concealed, or where there has been no such assertion of their rights by either of the spouses as would ordinarily and reasonably be expected from the fact of the existence of such relation.

In this case it appears from the stipulation that the ordinary assertion was made. The parties were residents of this state, and they were living together continuously as husband and wife, and the slightest inquiry on the part of Corrigan would have elicited this fact and furnished him with information of the community relations of the parties. Mrs. Semon certainly did all that the law at that time required of her to give notice of her relations with the community, viz., she lived with her husband as his wife; and if, under such circumstances, there being no assertion that she knew of the attempted transfer by her husband and no claim of any act or omission by her on which a plea of estoppel could be founded, the community real estate can be transferred without her consent, the statute in relation to the sale of community real estate might as well be pronounced a nullity.

Without particularly reviewing the case of *Sadler v. Niesz*, a glance at the opinions filed in that case will conclusively show that it is not a parallel case with the one at bar in any particular.

The judgment is affirmed.

SCOTT and HOYT, JJ., concur.

ANDERS and STILES, JJ., concur in the result.

June, 1898.] Opinion of the Court—DUNBAR, C. J.

[No. 852. Decided June 20, 1893.]

MARY A. BOOTH AND CATHERINE CLARK, *Respondents*,
v. THE COLUMBIA AND PUGET SOUND RAILROAD COM-
PANY, *Appellant*.

6	531
7	501
33*	1075
35*	375
6	531
17	480
6	531
20	624

APPEAL—WEIGHT OF TESTIMONY—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Where there is evidence in an action tending to support the issues made, the supreme court will not pass upon the weight of the testimony.

Where the complaint in an action for damages alleged that the ties of defendant's road bed were rotten and unsafe, whereby the injury was caused, defendant had sufficient notice to put it upon an investigation of all its road bed at the place where the accident occurred, and the defendant is not entitled to a new trial on the ground that it was surprised at the proof of the defective condition of a particular tie, and that it now has newly discovered evidence to the contrary.

Appeal from Superior Court, King County.

Andrew F. Burleigh, for appellant.

Tustin, Gearin & Crews, and *M. A. Baker*, for respondents.

The opinion of the court was delivered by

DUNBAR, C. J.—This is an appeal from a judgment rendered on a verdict for damages alleged to have been inflicted on passengers by a railroad company. Actions were brought separately by respondent Mary A. Booth and respondent Catherine Clark, and as their injuries were caused by the same accident, in the interests of economy the causes have been consolidated. The plaintiffs based their action on the negligence of the railroad company in permitting its track and roadbed to become and remain out of repair and unfit for use, and for permitting the ties on said roadbed to become rotten and unsafe. Defendant

denies negligence of any kind, and alleges contributory negligence on the part of the plaintiffs. There is no proof, however, tending to sustain this allegation, and it is not urged here.

Conceding for the purposes of this decision the soundness of all the propositions of law advanced by appellant, yet the judgment in this case must be affirmed; for we think there was *some* evidence which was properly presented to the jury, which tended to support the allegation that the ties on the road were rotten and unsafe for the uses for which they were intended, and that such defects in the ties were the cause of the accident and the injuries to plaintiffs; and that there was sufficient evidence, if not denied, to support a judgment. Whether or not it was successfully denied, is a question for the jury to pass upon, and they have passed upon that question in favor of the contention of the respondents, and this court will therefore not presume to set aside their verdict, even though in its judgment the weight of testimony is in favor of the appellant.

Several witnesses testified that at the point where the accident occurred the ties were in a very bad and unsafe condition; that some of them were so rotten that they could be kicked to pieces; and one witness testified that when he walked on one side of the track the other side would jump up. It is true that the witnesses who testified most strongly as to the bad condition of the track were the respective husbands of the respondents, but this fact would only be a circumstance for the jury to consider as affecting their credibility. It is urged by the appellant that there is no testimony showing the defective condition of the track at the point where the car wheels first left the track, and it locates that point by the marks of the wheels on the ties; but on the other hand it is argued by the respondents that if the first car left the rails and forced its way through the

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rotten ties dragging the second car off, the place where the wheels of the second car left marks on the solid ties would be no indication at all where the first car went off the track. This at least was a reasonable theory to urge upon the jury, and it may have been the view which the jury adopted. The ordinary expression used by the witnesses in locating the rotten ties was "at the point where the accident occurred," and as it is only claimed by appellant that the distance was from twenty to forty feet from where the car left the track to where it finally toppled over, we think the defects in the track were located near enough to warrant the jury in coming to the conclusion that the accident was caused by the defective track, especially as the train was running so very slow, at the rate of eight or nine miles an hour, on an up grade, and defendants offered no explanation whatever of the accident.

It is urged by the appellant that the court erred in refusing to allow the jury to view the premises in accordance with its request. It is not necessary to discuss this question, as the record fails to show that any such request was made by appellant, or refused by the court.

Appellant urges that the court erred in refusing to allow a new trial on the ground of newly discovered evidence. We have examined the affidavits of appellant in support of its motion for a new trial, and think that under the allegations of the complaint, which definitely charge that the ties of the roadbed were rotten and unsafe, that the defendant had sufficient notice to put it upon an investigation of all the roadbed at the place where the accident occurred, and that it could not have been surprised at the proof of the defective condition of any particular tie.

There is no question raised as to the instructions of the court, or of the excessiveness of the verdict.

The judgment in both cases will be affirmed.

ANDERS, HOYT, SCOTT and STILES, JJ., concur.

6	534
8	221
33*	875
36*	146
6	534
17	350

[No. 819. Decided June 22, 1893.]

SARAH PACKSCHER, *Appellant*, v. JOHN N. FULLER *et al.*,
Respondents.

LIMITATION OF ACTIONS—WHEN TIME BEGINS TO RUN—BOUNDARIES—HOW ASCERTAINED.

Under the statute of 1881, which reduced the limitation for the commencement of actions to recover the possession of real estate from twenty to ten years after the accrual of the cause of action, a party whose action had not been barred under the old law has the full period of ten years after the taking effect of the act of 1881 in which to commence such action, although the time had begun to run under the former law.

The patentee from the government, of the northeast quarter of a certain section, which was described as containing 160 acres of land, made conveyances thereof as follows: To one grantee, a tract commencing 20 rods south of the northeast corner of the northwest quarter of the northeast quarter of said section, thence 8 rods west, thence 20 rods south, thence 8 rods east, thence 20 rods north to the beginning; to another grantee, a tract commencing at the northwest corner of the northeast quarter of the northeast quarter of said section, thence south 40 rods, thence east 20 rods, thence north 40 rods, thence west 20 rods to the beginning. Both grantees claimed a strip of land averaging eighteen feet in width. In an action by one for possession of said strip of land it was shown that none of the lines of said quarter section were one-half mile in length. *Held*, That the starting point for the survey of the two tracts in controversy should be the exact middle of the line between the northeast corner of the section and the half-mile post set by the government surveyors, and that a line run south from that point would establish the boundary between the two tracts.

Appeal from Superior Court, Pierce County.

Pritchard, Stevens, Grosscup & Seymour, and *W. C. Sharpstein*, for appellant.

Carroll & Carroll, and *H. M. Hagerman*, for respondents.

The opinion of the court was delivered by

ANDERS, J.—On August 22, 1868, Howard Carr, who, as grantee of the United States, was the owner of the north-

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east quarter of section 31, township 21 north, of range 3 east, conveyed, by deed duly executed and recorded, to the appellant, a portion thereof described as follows:

“Commencing twenty rods south of the northeast corner of the northwest quarter of the northeast quarter of section 31, township 21 north, of range 3 east, running thence eight rods west, thence twenty rods south, thence eight rods east, thence twenty rods north to the place of beginning, containing one acre.”

And on October 2, 1872, Howard Carr and wife conveyed by deed duly executed to one Job Carr another portion of his said land described as follows:

“Beginning at the northwest corner of the northeast quarter of the northeast quarter of section 31, township 21 north, of range 3 east of the Willamette Meridian, running thence south forty rods, thence east twenty rods, thence north forty rods, thence west twenty rods, to the place of beginning, and containing five acres.”

This five acre tract of land Job Carr in the year 1873 surveyed and platted as Job Carr's First Addition to Tacoma City. On December 13, 1880, lots eight and nine, and fractional lot seven, of block thirty, of this addition, according to the plat thereof, were conveyed to the respondent Matthews, who, on April 10, 1883, conveyed by deed an undivided one-half of the same to the respondent, John N. Fuller. These lots, as designated on the ground, were, when purchased by respondents, inclosed by a fence which seems to have been maintained ever since, and which was built perhaps as early as the year 1875. The land within the inclosure has been in the possession of the respondents and their grantors ever since the fence was erected, and each and every occupant has considered and claimed it as a part of Job Carr's First Addition to Tacoma, and not as a part or parcel of any other premises.

It will be seen by an inspection of the description of the premises conveyed to the respective parties to this contro-

versy that the land of the appellant lies on the west, and that of the respondents on the east, side of the dividing line between the northwest quarter of the northeast quarter and the northeast quarter of the northeast quarter of section 31, township 21 north, of range 3 east. And while the respondents at all times believed that their fence was upon this division line, the appellant has at no time claimed to be the owner, or entitled to the possession, of any land to the east of said line. But in the year 1889 the appellant caused the land described in her deed to be surveyed, and claims to have then ascertained that a portion of her premises one hundred and nineteen feet long and nineteen feet wide at one extremity and seventeen feet wide at the other, was within the inclosure of the respondents. She demanded the removal of the fence. Her demand was not complied with, and she thereupon instituted this action for the possession of said strip of land and for damages for the wrongful detention thereof. It would seem from the pleadings in this case that the real contention between these parties is as to the location of the true line dividing their respective premises. But, from the course taken at the trial, it appears that the cause also proceeded upon the further theory of the respondents that they were entitled to the disputed premises by virtue of having been in adverse possession thereof for the period of time prescribed by the statute of limitations.

The court recognized the question of adverse possession as being properly involved in the case, and instructed the jury upon that subject. The court, in effect, charged the jury that ten years' adverse possession would bar plaintiff's right of recovery. This, the appellant claims, was error, and insists—(1) That the statute passed in the year 1881 (Code of 1881, § 26, Code Proc., § 112), limiting the time for the commencement of actions to recover the possession of real estate to ten years after the cause of action shall have accrued, is not applicable to this case; and (2) that

June, 1893.] Opinion of the Court—ANDERS, J.

if it is applicable then the time must be computed from the taking effect of the statute, and that the jury should have been so instructed. We think the statute of 1881 must govern, unaffected by the provisions of the prior law, and that the plaintiff (appellant here) had the full period of ten years after it took effect in which to commence her action. No mention is made of existing rights of action in this statute of 1881, and we cannot presume that the legislature intended it to have a retrospective operation in the absence of anything more indicative of such an intention than the general language of the provision itself. *Sohn v. Waterson*, 17 Wall. 596.

The rule as to which statute governs when a change has been made in the period of limitation is laid down in Wood on Limitation of Actions, p. 30, as follows:

“If, before the statute bar has become complete, the statutory period is changed, and no mention is made of existing claims, it is generally held that the old law is not modified by the new, so as to give to both statutes a proportional effect; but that the time past is effaced, and the new law governs. That is, the period provided by the new law must run upon all existing claims, in order to constitute a bar. In other words, the statute in force at the time the action is brought controls, unless the time limited by the old statute for commencing an action has elapsed, while the old statute was in force, and before the suit is brought, in which case the suit is barred, and no subsequent statute can renew the right or take away the bar.”

It is true that § 133 of the Code of Procedure provides that when a limitation or a period of time prescribed in any existing statute for acquiring a right or barring a remedy has begun to run before this code takes effect, and the same or any other limit is prescribed in this code, the time which has run shall be deemed part of the time prescribed by such limitation, but this court held, in *Baer v. Choir*, 32 Pac. Rep. 776, that inasmuch as this provision

was not a part of the general statute of limitations found in chap. 2 of the Code of 1881, as passed by the legislature, but was originally § 1294 of the act of November 16, 1881, relating to crimes and punishments and proceedings in criminal cases, and also § 1683 of the act of November 4, 1881, defining the jurisdiction and practice of probate courts, said general statute is not affected or controlled by it. That section can, therefore, have no bearing upon this case and will not be further considered. It is not contended by the respondents that this action was not begun within ten years after the statute of 1881 went into operation, and it therefore follows from what we have already said that the question of adverse possession must be eliminated from the consideration of this case. And, indeed, the same result would follow if the former statute of limitation of twenty years could be pleaded in bar of the action.

• This leaves but one question to be determined, namely, what is the proper method of determining the location upon the ground of the dividing line between the subdivisions above mentioned of the land formerly owned by Howard Carr?

It is claimed by the respondents that this line was correctly ascertained and established when the addition to the city was surveyed and platted where respondents and their grantors have always claimed it to be, and that it cannot now be changed after the lapse of so many years. In making the survey of the five acre tract conveyed to Job Carr, the surveyor located the northeast corner of the northwest quarter of the northeast quarter of section 31—the starting point mentioned in the deed and also in that of the appellant—at a point on the north line of the section 1320 feet west of the northeast corner thereof as established by the government survey, on the theory that, as the patent to Howard Carr stated that that quarter section contained one

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hundred and sixty acres of land, the point sought for must of necessity be that distance—one-fourth of a mile—from the corner post. From the point thus established he proceeded to lay off the land covered by the deed by following the courses therein specified, and it is insisted that the north and south line thus located is the true line between the premises in dispute. This is controverted by the appellant. And it is urged on her behalf that the starting point called for in the deeds from Howard Carr lies midway between the northeast and the northwest corner of that quarter section. On this theory the appellant's survey was made. The surveyor who did the work testified that he ascertained this starting point by first platting the entire section, according to the government survey as shown by the original government posts, all of which were found, as well as the witness trees to those posts; that he carefully measured the four boundaries of the northeast quarter and established the middle points of those boundaries, and then struck lines across, and quartered the northeast quarter; that in fact all of the boundaries were less than half a mile in length, although represented as being half a mile in the government field notes. In other words, he fixed his starting point exactly in the middle of the line between the northeast corner of the section and the half-mile post west on the north line, according to actual measurement upon the ground. And we think that the point so established was the true starting point called for in the deeds, and that a line drawn south from that point to the middle point of the south boundary is the true line of division between the premises in controversy.

If the land in dispute lies west of that line, then the appellant is entitled to recover its possession, but otherwise if it lies on the east side thereof. And this will be the only question to be determined upon a new trial.

The judgment is reversed, and the cause remanded to

the court below for a new trial in accordance with this opinion.

DUNBAR, C. J., and HOYT and SCOTT, JJ., concur.

STILES, J., disqualified.

[No. 831. Decided June 22, 1893.]

C. A. MENTZER AND SAMUEL HICE, *Respondents*, v. S. PETERS, ERNEST NIEHOFF AND H. T. DENHAM, *Appellants*.

6	540
121	621
6	540
122	465
6	540
p86	336

MECHANICS' LIENS—MATERIALS FURNISHED HOLDER OF EQUITABLE TITLE—LIABILITY OF OWNER OF FEE.

Where materials are furnished for a building to one who has possession of the land upon which the building is being constructed under a contract of purchase, a lien can attach only to the interest of the holder of such contract; and on a forfeiture of his rights thereunder, the owner of the legal title is not liable to, personal judgment for such materials, nor is his interest in the land subject to a mechanic's lien therefor.

Appeal from Superior Court, Pierce County.

J. P. Cass, and *H. W. Lueders*, for appellants.

J. A. Williamson, for respondents.

The opinion of the court was delivered by

SCOTT, J.—The appellant Denham was the owner of a certain lot in the city of Tacoma, and contracted in writing to sell the same to one Niehoff. Niehoff entered into possession of the property under said contract and employed one Peters as a day laborer to construct a building thereon. The respondents furnished certain material for Niehoff under Peters' directions, which was used in the construction of said building, and they filed a lien therefor

June, 1893.] Opinion of the Court—SCOTT, J.

and brought this action to foreclose the same. A decree was rendered in their favor, and Denham appealed. A personal judgment for the amount of the claim was also rendered against defendants Niehoff and Denham. The action was dismissed as to Peters.

It fully appears that Denham had nothing to do with the construction of this building, or the purchasing of the material therefor. There was no foundation whatever for the rendition of any personal judgment against him in the proofs, nor can the lien upon the premises be sustained. Niehoff had possession of the premises under said contract of purchase. This contract was conditioned upon his making payment therefor, and he caused the work in question to be done while he was in possession under the contract. Subsequently he made default in the terms of the contract, and his rights thereunder were forfeited and lost, and Denham became repossessed of the premises of which he had held the legal title during all of said times. Such being the facts, this case falls within the decision rendered in *St. Paul & Tacoma Lumber Co. v. Bolton*, 5 Wash. 763 (32 Pac. Rep. 787), decided since this cause was tried. The lien only could have attached upon the interest of the defendant Niehoff, and he lost this through his failure to comply with his contract of purchase. The respondents did not attempt to comply therewith to preserve his or their rights thereunder.

The decree is reversed, in so far as it adjudges a lien upon the premises, and also as to the rendition of a personal judgment against Denham.

DUNBAR, C. J., and ANDERS, HOYT and STILES, JJ.,
concur.

[No. 869. Decided June 22, 1893.]

JACOB FURTH, *Appellant*, v. GEORGE H. SNELL *et al.*,
Respondents.

FRAUDULENT CONVEYANCES—SUFFICIENCY OF EVIDENCE—ASSIGN-
 MENT FOR BENEFIT OF CREDITORS.

A debtor in failing circumstances made a bill of sale of his stock of goods and store fixtures to the plaintiff, the consideration paid by the plaintiff being the surrender of three promissory notes executed by the debtor as follows: One for \$500, to the plaintiff, one for \$2,700, to the debtor's father, and one for \$250, to the debtor's brother-in-law, the latter two notes having been turned over to the plaintiff by the father and brother-in-law in payment of valid indebtedness from them to him; it was not clearly established that the debtor owed these sums to his father and brother-in-law, but it was clearly shown that the latter parties owed the sums named to the plaintiff, and that the plaintiff acted in good faith, without knowledge of the debtor's other indebtedness, or of any intent on his part to defraud. The plaintiff took possession of the stock of goods, but shortly thereafter it was attached by other creditors and sold as the property of the debtor, although the creditors had full notice of the plaintiff's rights. *Held*, That the plaintiff was entitled to recover the value of the stock of goods and store fixtures.

The fact that a debtor in failing circumstances disposes of his entire property to one creditor does not work an assignment thereof, by operation of law, for the benefit of creditors.

Appeal from Superior Court, King County.

Preston, Carr & Preston, and *W. R. Bell*, for appellant.
Stratton, Lewis & Gilman, for respondents.

The opinion of the court was delivered by

SCOTT, J.—This action was brought to recover the value of a stock of drugs and store fixtures converted by the defendants. On April 9, 1891, one Isaac Korn was the owner, and in possession of the same, and engaged in business in the city of Seattle as a retail druggist. At said time he was indebted to the appellant in the sum of \$500, for

6	542
10	506
33*	830
39*	145
6	542
13	664
J13	866
6	542
16	297
17	49
17	44

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money previously loaned to him. The appellant also held a note for \$250, given by said Korn to one Bories, and another note for \$2,700, given by said Isaac Korn to M. Korn, these notes having been transferred by the payees to appellant on certain indebtedness owed by them to him. Said Bories was said Isaac Korn's brother-in-law, and M. Korn was his father. On April 9th aforesaid Isaac Korn made a bill of sale of said property to appellant, whereupon appellant immediately took possession of the property, and kept it until the levy hereinafter mentioned. Isaac Korn was also indebted to the respondent, the firm of Snell, Heitschu & Woodard, on an open account for goods purchased, in the sum of nearly \$3,000. On April 11, 1891, said firm commenced an action against him in the superior court of King county, and caused a writ of attachment to issue therein to the respondent Woolery, who was then sheriff of said county, and caused the same to be levied upon the property aforesaid as the property of Isaac Korn. •Judgment was obtained in said action, and execution issued and levied upon the property, and the same was sold thereunder, and the proceeds applied upon said judgment. Prior to said sale appellant notified the respondents of his rights in the premises, and demanded that the property be returned to him. After the sale this action was instituted. A jury trial was had, which resulted in a verdict and judgment for the defendants, and an appeal was taken to this court.

One of the points raised, and the only one which will be discussed, is that the evidence was insufficient to justify the verdict. There was evidence to show that at various times Isaac Korn had stated to the respondents Snell, Heitschu & Woodard that he was indebted to no one else excepting said firm; that his business was in a prosperous condition, etc.; and that by means thereof he succeeded in maintaining his credit with them, and in obtaining goods

from them from time to time upon credit. There was also some evidence from which it might be inferred that Isaac Korn had no other property excepting the stock of goods and store fixtures aforesaid. Said proof amounted to no more than an inference, however, but for the purposes of this action the point will be considered as established. Neither Isaac Korn, M. Korn nor Bories were examined as witnesses by either party. It is contended by respondents that Isaac Korn was not indebted to either his father or his brother-in-law; and that he gave said notes to them with the fraudulent purpose of placing his property beyond the reach of his creditors. There was no proof to sustain this, however, excepting the statements of Isaac Korn with regard to his indebtedness made as aforesaid, and this not having been brought to the knowledge of appellant was not evidence as against him. Upon cross examination the appellant was asked if he knew whether the indebtedness of \$2,700 from Isaac Korn to M. Korn was a valid indebtedness, and he answered that he did, and that the same was a valid indebtedness. He was asked if he knew what it was for, and he answered "Yes, a portion of it was paid by M. Korn to some of the creditors of Isaac Korn some time before the bill of sale was taken." Upon the receipt of said bill of sale and a transfer of said property, appellant surrendered to Isaac Korn said three notes—one for the \$500 which he had loaned Isaac Korn individually, and the other two for \$250 and \$2,700 given to Bories and M. Korn, respectively. The foregoing was all the evidence relating to the validity of said indebtedness, and it stood uncontradicted. Bories and Isaac Korn had previously been partners in said business. Isaac Korn was at one time indebted to appellant in the sum of \$1,500, and upon being pressed to pay, he had succeeding in reducing the same \$1,000, leaving said \$500 remaining unpaid. It appears also that appellant did not regard Isaac Korn's

June, 1893.] Opinion of the Court—SCOTT, J.

business as being in a prosperous condition, and he testifies that for that reason he did not want to carry him any longer. He did not know that he was indebted to respondents, but supposed that quite likely he was owing others than M. Korn, Bories and himself. The respondents do not question said indebtedness of \$500 from Isaac Korn to appellant, but as before stated, contend that the notes given by Isaac Korn to M. Korn and Bories, and by them transferred to appellant, were fraudulent. It stands unquestioned that the transfer of these notes to appellant by Bories and M. Korn was *bona fide* upon debts actually owing by them to appellant. It is not contended that appellant entered into any actual fraudulent conspiracy with Isaac Korn to place his property beyond the reach of his other creditors, but it is contended by respondents that as appellant knew, or had reason to believe, that Isaac Korn's business was not in a prosperous condition, and that most likely he was indebted to other persons than himself, M. Korn and Bories, and that he was by said bill of sale transferring to him all of his available property, that the transaction amounted to a fraud as against respondents, and that appellant could claim no rights in the premises as against them. It is contended that the transfer of said stock of goods and store fixtures by Isaac Korn, under the circumstances, should be held in law as equivalent to an assignment of all his property for the benefit of his creditors, and that the transfer thereof to appellant amounted to a preference of creditors which the law does not recognize in case of an assignment, and some cases decided elsewhere are cited in support thereof.

We are unable to agree with respondents' contention in the premises. While we have an assignment law which provides that an insolvent debtor may turn his property over for the benefit of his creditors, and by so doing under some circumstances may obtain a discharge of his indebt-

edness, and while a preference of creditors in such transaction will not be permitted, yet the assignment itself is not compulsory. It is entirely optional with the debtor whether he will avail himself of the provisions of this act. If he does not choose to resort to proceedings in insolvency there is no way of compelling him to do so, and we have previously held that a debtor, even if in failing circumstances, may in good faith dispose of his entire property for the purpose of paying a portion of his debts, although other debts are left unsatisfied. *Turner v. Iowa National Bank*, 2 Wash. 192 (26 Pac. Rep. 256); *Ephraim v. Kelleher*, 4 Wash. 243 (29 Pac. Rep. 990); *Benham v. Ham*, 5 Wash. 128 (31 Pac. Rep. 459); *Samuel v. Kittenger*, ante, p. 261.

It appears from the uncontradicted evidence in this case that appellant took this property at its fair market value in payment of valid subsisting claims held by him against Isaac Korn, and that he acted in good faith in the premises, and that the respondents at the time they levied upon and sold said goods had full notice of his rights in the premises. Under this state of affairs the appellant's contention that there was no evidence to support the verdict, must be sustained, and the judgment is reversed, and cause remanded.

DUNBAR, C. J., and ANDERS, HOYT and STILES, JJ., concur.

June, 1898.] Opinion of the Court—DUNBAR, C. J.

[No. 892. Decided June 24, 1893.]

THE CITY OF SPOKANE, *Respondent*, v. ANDREW M. ROBISON, *Appellant*.

MUNICIPAL CORPORATIONS—VIOLATION OF ORDINANCES—PROSECUTION—EVIDENCE—MAINTAINING SLAUGHTER HOUSE IN CITY LIMITS.

A prosecution for the violation of a city ordinance may be conducted in the name of the city instead of in the name of the state.

The charter of the city of Spokane providing that the city attorney shall conduct all prosecutions for violations of its ordinances does not require that officer to subscribe and swear to the complaints therefor, and the prosecution may be had upon the complaint of any private person.

In a prosecution for maintaining a slaughter house within the city limits at a certain time in the year 1892, evidence is immaterial as to what the boundaries were in 1886.

Cities of the first class are authorized to prohibit the erection and maintenance of slaughter houses within their corporate limits.

Appeal from Superior Court, Spokane County.

Dawson & Plattor, for appellant.

P. Q. Rothrock, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—The respondent was convicted of violating a certain ordinance of the city of Spokane, which provides that it shall be unlawful for any person, firm or corporation to create, erect, construct, maintain, keep or use any tannery, bone or soap factory, packing house, slaughter house, stock yard, or any other offensive or unwholesome business or establishment, within the limits of the city of Spokane Falls, and provides for the punishment of a violation of said ordinance.

The complaint was as follows:

“P. G. Clough, being duly sworn, says that he resides in the city of Spokane, Spokane county, Washington;

that on the 31st day of May, 1892, in said city of Spokane, Andrew M. Robison did willfully and unlawfully violate §§ 1 and 2 of ordinance number 22, entitled 'An ordinance to prohibit the erection of tanneries and slaughter houses within the limits of the city of Spokane,' and passed August 20, 1884, of the laws and ordinances of the city of Spokane, in that he did then and there keep and use a slaughter house and stock yard within the limits of said city of Spokane. Wherefore he prays," etc.

We do not think the contention that the complaint is invalid because the case is entitled *City of Spokane v. Andrew M. Robison* is well founded. Under similar constitutions, as far as we have been able to ascertain, it has been universally held that the constitutional provision that all prosecutions shall be conducted in the name of the state does not apply to prosecutions by municipal corporations for the violation of city ordinances. In discussing this subject, Mr. Dillon, in his work on *Municipal Corporations*, vol. 1, § 429, says:

"The distinction between statute law and municipal by-laws has been pointed out, and the subject of concurrent prohibitions of the same act by the general law and by the local ordinances of a municipality treated in the chapter on ordinances. The distinction is there drawn, and is to be observed, between acts not essentially criminal, relating to municipal police and regulation, and those intrinsically criminal, and which are made punishable as public offenses by the general laws of the state. The pecuniary penalties which are annexed to violations of the former class the legislature may, we think, authorize the corporation to enforce in its own name."

The cases there discussed and cited are under constitutional provisions similar to ours. Our legislature has especially provided that all prosecutions for the violation of a city ordinance shall be conducted in the name of the city. See § 533, Gen. Stat.

The second ground of objection, we think, is equally un-

June, 1893.] Opinion of the Court — DUNBAR, C. J.

tenable. While it is true that the charter of the city provides that the city attorney is the public prosecutor of the city, and also provides that it shall be the duty of the city attorney to conduct all prosecutions for offenses committed against any of the ordinances of the city, it does not provide, nor can it be inferred, that the city attorney must subscribe and swear to all complaints for violations of city ordinances, and that no prosecutions shall be maintained unless he does so. Sec. 533 of the code, referred to above, expressly provides that prosecutions for the violation of any city ordinance may be on the complaint of any person, and this law we think in no way conflicts with the charter provisions of the city of Spokane. There is a vast difference between conducting a prosecution and swearing to a complaint.

In our judgment the court did not commit any error in denying the motion to dismiss. The demurrer was also properly overruled, as the complaint stated a cause of action against the defendant. The ordinance prohibits any one from maintaining a slaughter house within the limits of the city, and defendant was charged with violating the ordinance properly referred to in the complaint by keeping and using a slaughter house within the limits of the city for a certain definite time mentioned. We hardly see how the crime could have been more definitely charged. The evidence offered by the appellant, and to the introduction of which the court sustained an objection, was properly rejected for the reason that it was immaterial what the boundary of the city was in January, 1886, or at any other time than at the time of the alleged violation of the ordinance.

We see nothing objectionable in the instructions of the court, so far as the right of the city to pass such an ordinance is concerned. It is unquestioned that our statute empowers cities of the first class (to which class the city

of Spokane belongs) to direct the location and construction of all buildings in which any trade or occupation offensive to the senses or deleterious to the public health or safety shall be carried on, to regulate the management thereof, and to prohibit the erection or maintenance of such buildings or structures, or the carrying on of such trade or occupation, within the limits of such corporation, etc. A slaughter house, as it is generally conducted, is notoriously offensive to the senses, and we have no doubt was one of the occupations especially contemplated by the legislature when the power was conferred on the cities. Nor do we think that the enactment of subdivision 34 (Laws 1889-90, p. 223, § 5) destroys any of the force of the language used or power conferred in subdivision 22 (*Id.*). The vital question in this case, viz., the constitutional right of the city to exercise the power as a police regulation, has been so exhaustively argued by the supreme court of the United States in the noted *Slaughter House Cases*, reported in 16 Wall. 46, that the law may be considered as settled in favor of the validity of such power, and it would be but a work of supererogation to discuss this subject at length.

Our conclusion is, that the city had the power to pass the ordinance; that the appellant was legally charged and convicted of its violation, and that the judgment must be affirmed; and it is so ordered.

SCOTT, HOYT, STILES and ANDERS, JJ., concur.

June, 1893.] Opinion of the Court—DUNBAR, C. J.

[No. 659. Decided June 27, 1893.]

THE FAIRHAVEN LAND COMPANY *et al.*, *Respondents*, v. R.
C. JORDAN *et al.*, *Appellants*.

JUDGMENT OF SUPREME COURT—CONSTRUCTION.

Where the supreme court, in reversing a decree of the superior court in a suit for the foreclosure of mechanics' liens, virtually affirms the decree as to certain claimants, who were allowed interest on their claims by the judgment appealed from, by directing a decree in favor of such claimants "for the amounts claimed," the claimants are entitled to interest accrued before the rendition of judgment in the supreme court.

Original Application for Mandamus.

Bruce & Brown, for appellants.

Cole & Romaine, and *Kerr & McCord*, for respondents.

The opinion of the court was delivered by

DUNBAR, C. J.—This is a petition for a writ of mandate to direct the superior court of Whatcom county to enter judgment, in the case wherein the Fairhaven Land Company *et al.* are plaintiffs, and R. C. Jordan, Carmi Dibble and James P. Demattos are defendants, in accordance with the opinion of this court, filed February 14, 1893 (5 Wash. 729, 32 Pac. Rep. 729). The action was brought to foreclose five mechanics' liens upon the property of the defendant Demattos. The lien claimants joined in their complaint, which set out each claim as a separate cause of action. Judgment was rendered in the court below in favor of all the lien claimants. After reviewing the action here on appeal, the final judgment of this court was expressed in the opinion filed in the following language:

"The decree will be set aside and the cause remanded, with directions to the superior court to enter a new decree

in favor of A. E. Estabrook and the Mechanics' Mill and Lumber Company for the amounts claimed, with \$1.50 and \$3.25, respectively, paid out for filing liens; \$75 to each as an attorney's fee, and the costs of both courts. As against the other plaintiffs the complaint will be dismissed with costs in both courts to appellant."

The petitioner insists that in conformity with the judgment of this court it is the duty of the lower court to enter judgment in favor of the respective claimants for the sums set forth in their respective claims, with interest thereon after the rendition of the judgment of this court, and without interest thereon prior to the rendition of the judgment aforesaid, and that said court be directed to order and require to be entered a judgment for the face of the claims of said respective claimants without any interest, and for no other or different sum than the principal claimed by them in their respective claims.

With the view we take of this case it is not necessary to decide whether or not this court has power to compel a lower court to enter a judgment more specific than the judgment of this court.

The petitioner cites us to many authorities to prove that interest cannot be recovered in cases of this kind, but we express no opinion on this question; we are simply called upon to construe the opinion of this court heretofore rendered. Upon the argument of the original case in this court the question of interest was not raised. No error of the court below in allowing interest was assigned, and it cannot be raised now for the purpose of construing the opinion of this court which was written without an investigation of that question or without reference to it. The judgment appealed from allowed interest on the claims of Estabrook and the Mechanics' Mill & Lumber Company; the claims set out in their complaint were for interest, and while this court reversed the decree it was virtually an affirmation so far as those two claimants were concerned, and

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the judgment was not modified as to them only in so far as it was especially mentioned, and when the order of the court is "that the decree shall be entered in favor of these claimants *for the amounts claimed*," the language must be construed with reference to the amounts claimed, which we have seen include interest.

The petition will be denied.

HOYT, SCOTT and ANDERS, JJ., concur.

STILES, J., not sitting.

[No. 360. Decided June 27, 1893.]

SAMUEL LIVESLEY AND MARGARET LIVESLEY, *Respondents*, v. MORGAN P. O'BRIEN *et ux.*, *Appellants*.

6	553
124	582
6	568
84	298
6	553
38	36

JUDGMENT—FAILURE TO ANSWER INTERROGATORIES—MOTION TO VACATE—DISCRETION OF COURT.

Judgment may be given against defendants in an action for failure to answer interrogatories within the time prescribed by statute, although a formal order on the part of the court requiring defendants to answer such interrogatories has not been made.

A motion to vacate and set aside a judgment is directed to the discretion of the trial court, and its action in passing thereon will not be reversed on appeal, unless the showing made therefor leaves no room for the exercise of discretion by the lower court.

Appeal from Superior Court, King County.

Stratton, Lewis & Gilman (Ernest S. Lyons, of counsel), for appellants.

Thompson, Edsen & Humphries, for respondents.

The opinion of the court was delivered by

HOYT, J.—The judgment in this case was rendered under the authority of §1665, Code of Procedure, for

failure on the part of the defendants to answer interrogatories served upon them by the attorneys for the plaintiffs. There is only one suggestion on the part of the defendants against the regularity of the proceedings leading to the rendition of this judgment, and that is, that there was no formal order on the part of the court requiring the defendants to answer such interrogatories. In our opinion, upon the service of such interrogatories the defendants were required to answer the same, or show cause to the court why they should not do so, within the time prescribed by the statute, but even if this be not so, and it required some formal action on the part of the court by way of approval of such interrogatories before the defendants were so called upon to answer, in this case such approval was given by the court when it overruled the motion of the defendants to strike them from the files. It follows that the action of the court in rendering the judgment was regular.

The other question presented by the record is as to the sufficiency of the showing made by the defendants upon their motion to vacate and set aside such judgment. Motions of this character are directed to the discretion of the trial court, and its action in passing thereon will not be reversed by this court unless the record shows an abuse of such discretion. It is not sufficient that we should find as a matter of fact that the showing was sufficient to have justified the setting aside of the judgment. We must further find that the showing was such that there was no room for the exercise of discretion by the lower court before we can rightfully interfere. The showing made in this case does not furnish proof which so satisfies our minds. The motion when first made, the day after the rendition of the judgment, was accompanied by no showing whatever, and it is doubtful whether, as a matter of right, the defendants' showing thereafter made and filed without express leave of the court was entitled to any considera-

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Syllabus.

tion whatever. But even if it was, we do not think that such facts are made to appear therefrom that the duty of the court to set aside the judgment was made so clear that there was no proper discretion left in the court as to the action it should take. Such showing, although going over a good deal of ground, does not in fact give any good reason why the case did not receive the attention of some member of the firm of attorneys who represented the defendants. Beside, such showing, in certain particulars at least, does not correspond with the facts alleged in the answer of the defendants.

The judgment and order appealed from must be affirmed.

DUNBAR, C. J., and STILES, ANDERS and SCOTT, JJ.,
concur.

[No. 867. Decided June 27, 1893.]

J. A. CLOUD, *Appellant*, v. JACOB RIVORD AND CLESTINE
ARQUETT RIVORD, *Respondents*.

PROMISSORY NOTES — INTEREST — DEFAULT IN PAYMENT — MATU-
RITY OF NOTE — ATTORNEY'S FEE.

In a suit to foreclose a mortgage securing a promissory note and coupon interest notes the plaintiff is not entitled to judgment for the interest notes not due, although the note in terms provides that in case of default in payment of any interest when due, the principal note and interest coupons shall mature and become payable at once at the option of the holder.

Where a promissory note provides that it shall bear interest at the rate of four per cent. per month after maturity, such contract applies to the definite time set for the payment of the note, and not to the maturity arising by reason of a default in the payment of an installment of interest.

Where a promissory note contains a provision for the payment of an attorney's fee in case of suit to collect principal or interest,

such provision must be construed as a promise to pay a reasonable attorney's fee, and when plaintiff, in an action on such note, has alleged and proved a reasonable attorney's fee, he is entitled to judgment therefor.

Appeal from Superior Court, Skagit County.

Million & Houser, for appellant.

The opinion of the court was delivered by

DUNBAR, C. J.—This is an action to foreclose a mortgage on real estate which was given to secure a note for four hundred dollars given August 7, 1890. The note was made payable on the first day of July, A. D. 1895, and bears interest at the rate of ten per cent. per annum, with a provision that it shall bear interest at the rate of four per cent. per month after maturity. The interest is provided for in the shape of coupon notes of twenty dollars each attached to the principal note; each coupon or interest note provides that it shall bear interest at the rate of four per cent. per month after maturity. The note also provides that if any interest shall remain unpaid after due, the principal note and interest coupons shall become mature, due and payable at once, without further notice, at the option of the holder. There is also a promise to pay an attorney's fee in case of suit or action to collect the principal or interest. The third coupon note was not paid at maturity, and plaintiff brought his action to foreclose, asking judgment for \$579.20, which, if we understand the complaint, represents the face of the note and all the coupon notes not paid, together with interest on the same at the rate of four per cent. per month from date of filing the complaint, together with an attorney's fee of \$50, and \$17.07 taxes paid (concerning which there is no dispute).

The court refused to allow the demand for an attorney's fee, and rendered judgment for four hundred dollars with interest on the same at the rate of ten per cent. per annum

June, 1893.] Opinion of the Court—DUNBAR, C. J.

from April 6, 1892, the date of the commencement of the action, and for twenty dollars, the amount of the coupon note due, with interest on the same at the rate of four per cent. per month from the time it became due; also, for costs, including statutory attorney's fee. From this judgment the plaintiff appeals, and urges that he should have judgment for the coupon notes not due with interest on the face of the principal note at the rate of four per cent. per month from the date of the filing of the complaint, and for an attorney's fee of fifty dollars.

Inasmuch as the coupon notes, not due, simply represent the computed interest up to the time when the principal note would become matured by time, it is very evident that the consideration for such notes failed when judgment was obtained for the principal, and plaintiff would under no principle of law or ethics be allowed to recover both the use of the money, and the money which represented its use, and the court very properly refused this demand.

So far as the contention of the appellant is concerned, that under the terms of the note he should be allowed interest on four hundred dollars at the rate of four per cent. per month from the date of filing the complaint, we have to say that while it is true that the note provides that if any interest shall remain unpaid after due, the principal note and interest coupons shall become matured at the option of the holder, yet construing all the provisions of this note together, we think that the provision "this note shall bear interest at the rate of four per cent. per month after maturity" was inserted with reference to the maturity of the note first expressed, namely, the first day of July, 1895, the time when the money became due. This construction is strengthened by the fact that the interest up to that day is made definite and certain, and fully and separately provided for by the coupon interest notes attached, and the judgment of the court in respect to the interest was right.

We think, however, that the language used in the note and mortgage, viz., "If suit or action shall be brought to collect principal or interest we promise to pay a collection and attorney's fee in said suit or action, which fee shall be taxed as the attorney's fee in the judgment rendered," must be construed to be a promise to pay a reasonable attorney's fee, and as the plaintiff alleged and proved that fifty dollars was a reasonable attorney's fee in this case, he is entitled to a judgment for that amount.

The cause will, therefore, be remanded to the lower court with instructions to modify the judgment to the extent of allowing appellant the difference between the statutory attorney's fee allowed by the court below, and an attorney's fee of fifty dollars. The appellant will be entitled to his costs in this court.

HOYT, SCOTT, STILES and ANDERS, JJ., concur.

[No. 910. Decided June 27, 1893.]

C. M. ROMBOUGH, *Appellant*, v. GEROW KOONS AND
MARY KOONS, *Respondents*.

CONVEYANCES—SEIZIN OF GRANTOR—BREACH OF COVENANT—
AFTER ACQUIRED TITLE—RIGHT OF ACTION BY GRANTEE.

Where the grantor of land is neither in possession nor has any right of possession at the date of his deed, the covenant of seizin confers upon the grantee an immediate right of action for the recovery of purchase money paid, and the action cannot be defeated by the grantor's acquiring title subsequent to the commencement of the action.

Appeal from Superior Court, Spokane County.

Hyde, Glass & Reagan, for appellant.

Dawson & Plattor, for respondents.

The opinion of the court was delivered by

STILES, J.—Appellant brought an action to recover the sum of sixteen hundred dollars from the respondents, being the consideration paid in part by himself, and in part by his assignor Savage, for several deeds of real estate in Douglas county. These deeds were in the usual form of warranty deeds, and contained a covenant of seizin in fee, and the facts appearing by the record are as follows: One Mauntell and wife were the owners of three certain ten-acre tracts of land, and in December, 1891, they made a contract with the respondent Gerow Koons under which they agreed that if he would survey these tracts into town lots, and prepare plats which they contracted to execute, and would file the plats at his own cost, advertise the property for sale and sell the lots, they would upon his demand execute deeds for as many lots as he might sell at the price, to him, of eight dollars each. One clause of the contract was that the complete title of said real estate should remain in the Mauntells until the lots were paid for by Koons. Whether any plats were executed by Mauntell and wife is not shown, but it does appear that Koons had a plat or plats in his office in Spokane, from which he claimed to sell various lots. No survey was made until after this suit was commenced. Between the first of January and the first of April, 1892, respondents made the deeds in question to the appellant and Savage, conveying a number of lots to each of them. About the first of April, 1892, it was discovered by appellant and Savage that respondents had no title whatever to any of this property, and they tendered back their deeds and demanded the repayment of the purchase money paid, in the sum of sixteen hundred dollars, which was refused. Savage assigned his cause of action to the appellant, and this suit was brought. Subsequent to the commencement of the action the respondents

obtained from Mauntell and wife a warranty deed covering all the lots described in the deeds to Rombough and Savage, and at a later day a survey of the property into lots and blocks was made. The property was at no time in the actual possession of any person.

The contention of the appellant is, that a right of action accrued to him immediately upon the execution and delivery of his deeds because of the covenant of seizin therein, which he maintains is what is known to the law as a covenant *in presenti*, giving him immediate right to the recovery of his purchase money; while on the other hand the respondents maintain that the covenant for seizin is a real covenant which runs with the land and passes to the assignee thereof, and does not become available until there has been an eviction by the owner of the paramount title. The respondents maintain also, that inasmuch as they were in possession of this land, constructively of course, and by their deed passed the same possession or right of possession to their grantee, the covenant for seizin was satisfied for the present at least, and they especially urge that in such a case the after acquired title inured to the benefit of their grantee, who, at the most, was entitled to only nominal damages.

The superior court seems to have taken the respondents' view of the case all through, and so charged the jury that the result was a finding for the defendants, nominal damages, even, not having been awarded. In this position we think the court committed error.

With the controversy which has long been waged before various courts as to whether the covenant for seizin is a personal covenant *in presenti* or a real covenant running with the land, we shall not now attempt to engage. In our judgment it is not material in this case, for the universal holding of all courts seems to be that, where the grantor is neither in possession nor has any right of pos-

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session at the date of his deed, the covenant for seizin confers upon the grantee an immediate right of action, and the only question which has divided courts in such a case is as to whether an after acquired title can in any wise estop the grantee from maintaining his action, and recovering the purchase money paid as his damages. It is generally agreed, however, that where the title has been thus acquired before suit brought, the damages can only be such as have been actually suffered by the grantee. But there is another divergence among the courts in cases where the title is acquired after the action has been commenced. It is a general rule that such a title inures to the prior purchaser by warranty, or bargain and sale, deed, and in those states where it is held that the after acquired title absolutely passes, it is considered that only actual damages can be recovered even though the action be commenced before that time; but where it is held that the title inures only by estoppel, as against the grantor and his heirs and subsequent grantees with notice, the rule is the other way, and it is held that the grantee has his election whether he will take the title or will recover the money paid. The latter view is sustained by far the greater number of the authorities, and it seems to us is the better rule, inasmuch as under our registration laws the first grantee might retain his deed unrecorded, and a subsequent grantee would suffer by reason of the fact that he could never know, until the decease of his grantor, whether he might not at some time have executed another deed which, by relation, would take effect before his own. In these days of quick dealing with real property it has grown to be necessary, in the eyes of the courts, to do away with many of the technicalities pertaining to titles. Property is exchanged rapidly, and it is bought and sold entirely with a view to its quality of quick and safe transfer. A buyer who pays his money and takes his deed expects, and has a right to ex-

pect, that upon that instant the full title will pass to him, and nothing else will satisfy the contract which it is the intention of the parties in by far the greater majority of the cases to make.

In this case, even admitting that the respondents had the possession of these lots, and that the appellant succeeded to their possession, there can be no question but that the contract they intended to make by the deed would not be satisfied by the existence of the fact that respondents might some day receive the title under their contract with the Mauntells. And although the court submitted the case to the jury solely upon the question of possession, we find no evidence in the record tending to support any possession whatever. Koons' contract with the Mauntells gave him no possession, for at most he had a license to enter upon the land for the purpose of making a survey and to show it to purchasers. This was a license, merely, and gave him no right to take possession either as tenant or as purchaser. The terms of the contract retaining the entire title in Mauntell and wife until the money for which they contracted had been paid emphasized this fact. There was other evidence tending to show that neither Koons nor anyone else was in possession, or had ever thought of taking possession, of the lots; in fact, they were lots which had no real existence except upon the plat hanging in his office.

The authorities upon the propositions which we have stated are well summed up in *McInnis v. Lyman*, 62 Wis. 191 (22 N. W. Rep. 405); *Fritz v. Pusey*, 31 Minn. 368 (18 N. W. Rep. 94); *Shattuck v. Lamb*, 65 N. Y. 499, and particularly in *Resser v. Carney*, 54 N. W. Rep. (Minn.) 89.

We think it was the duty of the court to adopt the course here indicated, and that there should be a new trial. Judgment reversed, and remanded.

DUNBAR, C. J., and HOYT, ANDERS and SCOTT, JJ., concur.

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Syllabus.

[No. 710. Decided June 30, 1893.]

THE STATE OF WASHINGTON, *Respondent*, v. E. L. PAYNE,
Appellant.

APPEAL—SETTLEMENT OF BILL OF EXCEPTIONS—JURIES—MANNER
OF SELECTION—EVIDENCE—PROOF OF FORMER CONVICTION—
CREDIBILITY OF WITNESS—LARCENY—SUFFICIENCY OF EVI-
DENCE—ADMISSIONS.

Where an appellant has filed his bill of exceptions with the judge and served the respondent with a copy within the prescribed time, to which the respondent has filed objections and suggested certain amendments, the fact that the judge does not settle and sign the bill at the designated time, but subsequently, after a considerable length of absence from the state, settles and signs the bill of exceptions without notice to the respondent, but embodying the amendments proposed by the latter, is not sufficient ground for striking the bill from the transcript.

Under §§ 59, 61, Code Proc., prescribing the method of drawing a jury from the jury list certified by the county commissioners, a deputy sheriff is not authorized to act in place of the sheriff.

The fact that a sheriff does not make a return of his doings in summoning a special venire of jurors until after the commencement of the trial, is not ground for a challenge.

The certificate of the officers to a jury list drawn by them should state how the drawing was actually done, and not simply that it was conducted fairly and as provided by law.

Proof that a defendant in a criminal prosecution has formerly been confined in the county jail is irrelevant.

The only competent evidence of the former conviction of defendant in a criminal prosecution is the production of a judgment of a court of competent jurisdiction founded upon an indictment or other proper accusation.

The former conviction of a witness for the commission of a misdemeanor cannot be proved for the purpose of affecting his credibility.

An admission by defendant that he knew a certain larceny had been committed, was not evidence that he actually participated in the commission of the crime, and he could not be convicted on such an admission as a principal and active participant in the larceny.

6	563
17	550
17	562

6	568
22	26
32	187
32	257

6	563
33	350

6	563
40	435

The evidence is insufficient to sustain the conviction of defendant for the crime of grand larceny, when it is shown that the defendant and A and C, who had been drinking together, went to bed in a lodging house, occupying one room; that the defendant and A got up in the night, leaving C in the room with the door unlocked, and repaired to a neighboring saloon, where they spent the night in drinking, the defendant paying for the drinks with a twenty dollar gold piece; that C discovered in the morning that he had been robbed of his pocket book containing a twenty dollar gold piece; but there was no evidence identifying the coin spent by defendant as the one stolen from C, and defendant proved that he had received two twenty dollar gold pieces, in addition to silver coin, about a month prior thereto from a man for whom he had been working; and it was further shown that defendant had and was spending money on the night of the larceny and before the alleged commission of the crime.

Appeal from Superior Court, Pierce County.

Andrew J. Hanlon, for appellant.

W. H. Snell, Prosecuting Attorney, and *Charles Bedford*, for The State.

The opinion of the court was delivered by

ANDERS, J.—The appellant and one Arquet were tried, convicted and sentenced to the penitentiary for a period of seven years, upon an information charging them with the crime of grand larceny.

The case has heretofore been before this court on motion to dismiss for failure to file a transcript within the prescribed time; and the respondent now moves the court to strike from the transcript the bills of exception, on the grounds that they were signed after the time provided by statute and after the court had lost jurisdiction to sign and settle the same; that the same were signed without notice to the respondent as to the time and place, and without any time being set by the court; and that there are in the record what purports to be bills of exceptions and statement of facts, and the latter revokes and supersedes the former.

It appears from the record that a notice containing a statement of the time at which the attorneys for the appellant would apply to the judge to settle and sign the bills of exceptions, which were annexed to the notice, was served on the prosecuting attorney within the time prescribed by § 393 of the Code of Procedure. The prosecuting attorney filed objections and suggested certain amendments to the same, and they were not settled or signed at the time designated. Before taking any action in the matter, it seems that the judge had occasion to absent himself from the state for some time, but he subsequently settled and signed the bills of exception embodying therein the amendments proposed by the prosecuting attorney. No new notice of the time of settlement is shown, and no order fixing a time when the bills of exceptions would be signed appears. It does not appear that the appellant refused or neglected to do anything required of him by law, and the question is, shall he now be deprived of the right to have his case reviewed upon its merits in this court simply because the attorney for the state is not shown by the record to have had notice of the *final* action of the court in the premises? Under the circumstances, we think he should not. It is not claimed or suggested that the bills of exception are not in accordance with the facts; and having been brought to the attention of the court in proper time, we see no reason why they should not be considered. No statement of facts such as is provided for by statute, was filed or settled, but all of the matters for consideration on this appeal are brought up in the form of bills of exception certified by the trial judge.

The motion must be denied.

Before the commencement of the trial the defendant interposed a challenge to the panel of twenty-four jurors on the grounds that the names were not drawn from the jury list certified by the county commissioners, by the persons

designated by law to draw the same, and that the list as drawn was not properly certified. Although the challenge was not in writing, sworn to, and proved, as required by § 1300 of the Code of Procedure, it was nevertheless entertained and considered by the court. The particular objection to the panel was that the deputy sheriff, instead of the sheriff, assisted the county clerk and auditor in drawing the jury. The statute provides (Code Proc., § 59) that—

“The clerk of the superior court, or his deputy, and the sheriff and county auditor, shall place ballots prepared from such list in a box, and having thoroughly mixed them, the clerk, or his deputy, being blindfolded, shall draw the requisite number to serve as such petit jurors.”

And § 61 further provides that—

“If from any cause the sheriff or auditor, or both, shall not attend and assist the clerk in drawing jurors, as in this chapter provided, the clerk may call to his assistance such other county officer or officers as he may choose, and they shall proceed as is prescribed for the auditor and sheriff.”

It will be observed that these two sections provide that the deputy clerk may act in the place of the clerk, but there is no provision authorizing the deputy sheriff to act instead of the sheriff, and the clear implication of the language used is that the sheriff must assist in the drawing, in person, if at all, and not by deputy.

If it had been the intention of the legislature that the deputy sheriff, like the deputy clerk, might act instead of his principal, it seems that they would have said so, and would not have said that if the sheriff shall not attend then the clerk may call to his assistance such *other county officer* as he may choose. But it is claimed by the respondent that inasmuch as it is provided in § 80 of the Code of Procedure that the deputy sheriff has all the power of the sheriff and may perform any of the duties prescribed by law to be performed by the sheriff, the deputy sheriff was duly authorized to assist the clerk and auditor in

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drawing the jury although not mentioned in the sections of the statute pertaining to the selection of juries above quoted. We apprehend, however, that the duties and powers of deputy sheriffs mentioned in § 80 are such only as are usually incident to the office of sheriff, and are to be performed by him in his official capacity as sheriff, and do not include the execution of duties which are unofficial in character, and which may by law be performed as well by any other county officer who may be properly requested to perform them. The sheriff is designated by the legislature to perform, or assist in performing, the important duty of drawing the names of those who shall act as jurors, not because he is sheriff, but because he is deemed a proper person to execute a trust which must be confided to some one to perform. It needs no argument to prove the proposition that every person who has a cause to be tried in court has a right to have it submitted to a legal jury, that is, a jury selected by the persons designated by law. The statutes we are considering were passed long after § 80 became a law, and we cannot escape the conviction that if the legislature had intended that a sheriff's deputy might be delegated by the sheriff himself to perform this particular duty, they would not have made it the duty of the clerk to select some other county officer in the absence of the sheriff. Such trusts as are conferred upon the sheriff and auditor in this matter are, in our opinion, personal to themselves if accepted, and cannot be delegated by them to others. *State v. Newhouse*, 29 La. An. 824. Mere irregularities in the drawing of the jury are not grounds of challenge under our statute, but we do not deem a drawing by persons not authorized by law to be an irregularity merely, but a departure from the provisions of the law itself. *Brazier v. State*; 44 Ala. 387. We think, under the provisions of our jury statutes, and conceding for the purposes of this case that the defendant's challenge to the

panel was properly presented, that it should have been sustained.

The challenge and motion to set aside the special venire of fourteen names was properly disallowed, as it is not shown that the venire was not issued for a sufficient reason.

The challenge, on the ground that the sheriff or officer who summoned the jurors by virtue of the special venire did not make a return of his doings thereon until after the commencement of the trial, was properly overruled. It was not a sufficient reason for quashing the venire, and the court did right in causing the proper return to be made. Proffatt on Jury Trials, § 136.

The certificate of the officers who assisted in drawing the jury, to the list returned, is open to objection. It should have stated how the drawing was actually done, and not simply that it was conducted fairly and as provided by law..

Upon the trial the defendant himself testified in his own behalf, and upon cross-examination he was asked the question, "Were you ever confined in the county jail?" And also the further question, "Were you ever convicted of a crime before?" To each of these questions the defendant answered "No." Afterwards the prosecution introduced the sheriff of the county, whom the court permitted to testify, over the objection of the defendant, that the latter had been in the county jail under a conviction of petit larceny before a justice of the peace. He was also permitted to read to the jury the jail record and an order of commitment issued by the justice of the peace. This was clearly error on the part of the court. When the witness was asked the question, "Were you ever confined in the county jail?" and answered "No," the state was concluded by the answer, and could not contradict the witness. The matter inquired of was collateral and irrelevant to the

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issue before the jury, and was, therefore, irrebuttable. *Freidrich v. Territory*, 2 Wash. 358 (26 Pac. Rep. 976); *People v. McKeller*, 53 Cal. 65; *People v. Bell*, 53 Cal. 119. *Coble v. State*, 31 Ohio St. 100; Wharton, Crim. Ev. (9th ed.), § 484.

If it was competent to show that the appellant had been previously convicted of a crime, neither the jail record containing the names, description and term of sentence, etc., of persons confined therein, nor the warrant of commitment, was competent evidence to establish that fact. A conviction can only be shown by the record. A warrant of commitment, or, in other words, a *mittimus*, is sufficient to authorize and justify the sheriff in receiving and detaining a prisoner in the county jail, but it is not proof of a conviction. That can only be shown by the production of a judgment of a court of competent jurisdiction founded upon an indictment or other proper accusation. *Bartholomew v. People*, 104 Ill. 601.

But it is urged on behalf of the appellant that it was error to permit the prosecution to attempt to prove a former conviction of appellant of petit larceny, even for the purpose of affecting his credibility as a witness. It is provided in § 1647, Code Proc., that no person offered as a witness shall be excluded from giving evidence by reason of conviction of crime, but such conviction may be shown to affect his credibility, etc., but it is claimed that a conviction of a misdemeanor is not such a conviction of crime as is contemplated by the statute, and that only a conviction of a crime styled infamous is presumed, in law, to discredit.

At common law, persons convicted of infamous crimes were excluded from testifying as witnesses in courts of justice. Not all crimes were deemed infamous, but treason, felony and the *crimen falsi* were classed as such.

Whart., Cr. Law (9th ed.), § 22*a*. Our statute provides that a crime shall be deemed infamous which is punishable by death or imprisonment in the penitentiary. Gen. Stat., § 345. And crimes so punishable are felonies, while all other offenses are mere misdemeanors. Code Proc., § 1184. Petit larceny is, under our law, not an infamous crime.

Is it, then, a crime, the conviction of which may be shown to affect the credibility of a witness? In the case of *Bartholomew v. People*, *supra*, the supreme court of Illinois, in considering the effect of a statute quite similar to § 1647 of our code, held that the purpose of such a statute is simply to remove the common law disability, and to allow witnesses to testify who were thereby excluded, and that it does not profess to, nor does it by implication, enlarge the class of cases wherein convictions discredit the witness. In further speaking of the design of the statute, the court said:

“It could not have been designed to have allowed proof of a conviction for an offense, not legally presumed to affect his credibility, to be given in evidence.”

And analogous statutes have been similarly interpreted by the courts of other states. See *Coble v. State*, 31 Ohio St. 100; *Card v. Foot*, 57 Conn. 427 (18 Atl. Rep. 713). The convictions, therefore, which are referred to in § 1647 are only convictions of such crimes as before its passage excluded witnesses from testifying on account of infamy, and the crime, a conviction of which was attempted to be shown, was not of that class. It therefore follows that it was not competent to prove, or attempt to prove, it for the purpose of affecting the credibility of the appellant, or for any other purpose. And the charge of the court to the jury upon this point was also erroneous.

A witness for the prosecution, a member of the police

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force of the city of Tacoma, testified that he had a conversation with Payne at the jail, and that—

“He (Payne) told me that he had been wrongfully arrested; that he did not have anything to do with robbing the man, but he knew about it and helped ‘blow in’ the money. He said all three went to the lodging house together and took three beds in one room; that he couldn’t sleep, and in a short time he got up and went down and got the drinks; that Arquet threw down the twenty dollars and says, ‘how’s this!’ and after that they went up to Hank Halstead’s and blowed in the biggest part of it.”

This testimony is referred to as an admission, and also as a confession, on the part of Payne. And, in view of its having been introduced, the defendant requested the court to charge the jury as follows:

“*Second:* A confession made by a defendant that he knew, some time after the crime was committed, that the crime charged had been committed, is not evidence that he actually participated in the commission of the crime charged in the information, but would be evidence tending to show that he was an accessory after the fact, and could not be convicted on that confession as a principal and active participant in the commission of the crime charged.”

The court declined to so charge the jury, and in so doing, we think, committed error. Nor do we think the error was cured by the instruction which the court did give, which was as follows:

“You are instructed that an admission made by a defendant that he knew, some time after the crime was committed, that the crime charged had been committed, would not be evidence that he actually participated in the commission of the crime charged, and such an admission taken alone and without other testimony showing that he actually participated in the commission of the crime charged, would not be sufficient to warrant his conviction of the crime charged.”

This instruction is inconsistent with itself and was, therefore, calculated to confuse and mislead the jury.

The appellant contends that the testimony is insufficient to warrant the verdict. And this raises a question which we approach with no small degree of reluctance. But as insufficiency of the evidence is made a ground for a new trial by statute, it becomes our duty to determine the question thus presented. The testimony in the case is wholly circumstantial, and the facts are briefly these: The defendant, who had been living for some time at Anacortes, came up to Tacoma about the 16th or 17th day of January, 1892, and engaged in selling oysters in the saloons and about the streets at night. On the evening of February 21st, at about 8 or 9 o'clock, the appellant, Arquet, and Cox, whose money is alleged to have been stolen, were together in a saloon drinking, each treating the others in turn. In this they continued until after ten o'clock, when Arquet and Cox went together to a variety theatre, where they remained until half past two o'clock, at which time they returned to the saloon, where they again met Payne, who had put up his "oyster outfit" and come back to the saloon before the others returned from the theater. They again engaged in drinking for a while, and were all more or less intoxicated, and finally went to a cheap lodging house adjoining the saloon and went to bed, Payne paying for his bed and Cox paying for his and that of Arquet. They all occupied the same room, but each had a separate bed. Arquet and Payne undressed, but Cox lay down without taking off his clothes, and, as it appears, soon fell asleep, as also did Arquet. After they had been in the room an hour or more Payne got up, went to the head of the stairs and called the night clerk and asked him where he could get a drink. The clerk informed him that he thought the saloon next door was still open, whereupon he went back to his room and proceeded to dress himself, after which he and Arquet, who awoke in the meantime, again repaired to the saloon, leaving Cox in bed and the

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door unlocked as it had been previously to their getting up. The clerk at the lodging house accompanied Payne and Arquet to the saloon, where he took a drink with them and returned immediately to the lodging house.

About this time a police officer came into the saloon and he and the other two men remained there until six or seven o'clock in the morning engaged in conversation and drinking, when Payne proposed to return to the lodging house and go to bed, but, at the suggestion of Arquet, the three went to a restaurant and took breakfast, for which Payne paid. During the night Payne, in paying for the drinks, gave the bartender a twenty dollar gold piece from which the amount due for the drinks was deducted and the balance returned. This, it appears, was after Payne came back from the lodging house.

Cox did not awake until eight or nine o'clock in the morning, when, as he testified, he found that his pocketbook, containing a twenty-dollar gold piece and some smaller coins had been stolen. He met Payne about eleven o'clock and informed him that his money had been stolen, but did not accuse him of the theft. As before stated, the door of the bedroom was not locked at any time while it was occupied by Cox, or by him and the other two men. At what time during the night or morning the money was supposed to have been taken is not shown, but Cox testified he had it in his pocketbook when he went to bed. There is no evidence showing that Payne ever had Cox's pocketbook, and the circumstance of his having a twenty-dollar piece not shown to have been different in appearance from any other such coin, is the principal inculpatory evidence against him. It is not shown that he had no money before he met Cox, or at the time he went to the lodging house. In fact the evidence is uncontradicted that he had been spending money before that time and that he paid for his bed before retiring. He denied having taken

any money from Cox, and stated that he got the twenty-dollar coin which was changed by the barkeeper and another twenty-dollar piece, together with some silver dollars, from a man by the name of Williams, for whom he had been at work. And Williams, being sworn as a witness, testified that at the time Payne left Anacortes he paid him forty-six dollars, consisting of two twenty-dollar pieces and six dollars in silver, and that on the previous evening he gave him six dollars in silver. If it was incumbent upon the appellant to explain his possession of the twenty dollars, which is not shown ever to have been the property of Cox, we think his explanation was a reasonable one. But until the coin had been identified as the property of Cox, its possession called for no explanation whatever. It is the possession of property *shown to have been stolen* that raises a presumption of guilt on the part of the possessor, not the possession of like property merely, and such presumption is destroyed whenever a reasonable explanation is given and is not shown to be untrue.

No man ought to be convicted of a crime upon mere suspicion, or because he may have had an opportunity to commit it, or even because of bad character, and where circumstances are relied on for a conviction they ought to be of such a character as to negative every reasonable hypothesis except that of the defendant's guilt. And a new trial should be granted where a conviction is had on evidence not connecting the defendant with the crime beyond a reasonable doubt. *Williams v. State*, 85 Ga. 535 (11 S. E. Rep. 859).

While we are loth to disturb the verdict of a jury on the ground of insufficiency of the evidence to justify the verdict, yet where the evidence as disclosed by the record is palpably insufficient to warrant the verdict, as we deem it to be in this case, it is our duty to say so and to award a new trial.

There was no error in excluding the testimony of Arquet as to alleged threats made by Nutter against him, similar to those alleged to have been made by him against the appellant, and by reason of which the so-called confession was claimed to have been made.

For the errors indicated the judgment is reversed, and the cause remanded for a new trial.

SCOTT and STILES, JJ., concur.

DUNBAR, C. J., concurs in the result.

HOYT, J.—I think there was error in the admission of testimony for which the case must be reversed, but I do not agree with the other conclusions of the majority of the court.

[No. 766. Decided June 30, 1893.]

ANDREW WEYMOUTH, GEO. COOPER AND H. L. BLANCHARD, *Appellants*, v. PORT TOWNSEND SOUTHERN RAILROAD COMPANY, *Respondent*.

APPROPRIATION OF COUNTY ROAD—ACTION BY COUNTY FOR DAMAGES—PLEADING.

In an action against a railroad company, under §1570, Gen. Stat., to recover the cost of relocating and opening a portion of a county road alleged to have been appropriated by the company, the complaint fails to state a cause of action, when its only allegation of damage is "that the expense of relocating and opening that portion of the road so destroyed and appropriated by defendant as aforesaid is and *will be* the sum of thirty thousand dollars."

Appeal from Superior Court, Jefferson County.

R. E. Moody, for appellants.

Andrew F. Burleigh, for respondent.

The opinion of the court was delivered by

DUNBAR, C. J.—This was an action brought by the county commissioners of Jefferson county against the Port Townsend Southern Railroad Company to recover the sum of thirty thousand dollars, being the alleged expense of relocating and opening a portion of the county road alleged to have been destroyed and appropriated by respondent. It is conceded by both appellants and respondent that this action was brought under the provisions of the statute, and that the statute is exclusive, and therefore from that standpoint we will discuss it.

The complaint alleges the location and construction of the railroad upon the track occupied by the county road, and alleges the destruction of the county road thereby for about four miles. The allegation with reference to the damage is as follows: "That the expense of relocating and opening that portion of the road so destroyed and appropriated by defendant as aforesaid is and will be the sum of thirty thousand dollars," and judgment is prayed for in that sum. There is no allegation that the road has been relocated or opened, or that any expense has been incurred. At the time of the trial the defendant objected to the introduction of any evidence in support of the complaint because the complaint did not state a cause of action against the defendant, and because the suit was not brought in the corporate name of the county. The objection was sustained by the court, and the cause was dismissed.

It is only necessary for the final determination of this cause to notice the objection that the complaint does not state facts sufficient to state a cause of action. The statute, §§1569 and 1570, Gen. Stat., provide for the appropriation of lands by a railway company, and the latter part of §1570 reads as follows:

"And provided further, That if such corporation locate the bed of such railroad or canal upon any portion of the

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track now occupied by any established territorial or county road, said corporation shall be responsible to the county commissioners of said county or counties in which said territorial or county road so appropriated is located, for all expenses incurred by said county or counties, in relocating and opening the portion of said road so appropriated."

It is evident that, under the provisions of this law, the relocating and opening are conditions precedent to the right of recovery of damages. The language is *for all expenses incurred*. The allegation of the complaint is that the expense of relocating and opening *will be* the sum of thirty thousand dollars. There is no allegation that there has been a relocating or opening, or even that there will be a relocating or opening. The statute may not be a good one, but it is certainly a plain one, and is not susceptible of construction.

The complaint does not state a cause of action, and the judgment of the court is, therefore, affirmed.

STILES, HOYT, SCOTT and ANDERS, JJ., concur.

[No. 828. Decided June 30, 1898.]

HANNAH MORGAN *et al.*, *Respondents*, v. CARBON HILL COAL COMPANY, *Appellant*.

NEGLIGENCE—COAL MINING—VENTILATING MACHINERY—FELLOW SERVANTS—CONTRIBUTORY NEGLIGENCE—NON-SUIT.

The fact that a coal mining company had stopped its ventilating machinery from Saturday night until Sunday night does not constitute negligence when coupled with the fact that the machinery had been started and continuously run for a period of twelve or fourteen hours before an explosion of gas occurred on Monday morning. (DUNBAR, C. J., dissents.)

A "fire boss" in a coal mine, whose duty it is to direct the men to leave the place where they are working and go to another place

if, in his opinion, continuance at work in such place is dangerous, but who has no control of the action of the miners in the prosecution of their work, does not stand in the position of a vice principal. (DUNBAR, C. J., dissents.)

Where a miner assured a "fire boss" about to test the air in a gangway in a mine that there was no gas there, and the "fire boss" resting upon such assurance opened his lamp to light his pipe, and an explosion ensued, killing the miner, such remark on the part of the miner amounted to contributory negligence.

Although a defendant may go into his defense after the denial of his motion for a non-suit, he is entitled to the benefit of such motion if, at the time the proofs are finally closed, they are not sufficient to establish a *prima facie* case for the plaintiffs.

Appeal from Superior Court, Pierce County.

Judson & Sharpstein, for appellant.

R. P. Daniels, Hudson & Holt, and J. S. Whitehouse, for respondents.

The opinion of the court was delivered by

HORT, J.—The motion for non-suit made by the defendant at the close of the plaintiffs' case should have been granted. At that time there was absolutely no proof tending to show any negligence on the part of the company. On the contrary it affirmatively appeared from such proof that the company had taken every precaution required by law and custom to protect its employes while working in the mine. And as it is not claimed that the company is a guarantor of the safety of its employes while so working, there could be no liability in the absence of some negligence on its part. The only acts, excepting those of an employee by the name of Jones, claimed by the respondents to have shown negligence on the part of the company, was that of the stoppage of the ventilating machinery from Saturday night until Sunday night preceding the accident, which occurred on Monday morning at about 9 o'clock. But there is no proof whatever in the record tending to show that

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such stoppage of the machinery during such interval, when coupled with the fact of its being started and continuously run for a period of twelve or fourteen hours before the time of the accident, was in any manner an act of negligence on the part of the company.

As to the acts of the employé Jones we think the proof does not show that at the time of the accident he stood in the relation to the deceased of a vice principal of the company. We are satisfied with what was said by us in the opinion in the case of *Sayward v. Carlson*, 1 Wash. 29 (23 Pac. Rep. 830), but we do not think that under the definition of a vice-principal therein given, Jones occupied such a relation to the company. He had by virtue of his employment no right to control the action of the miners in the prosecution of their work. Such control was vested in another employé of the company known as the "inside boss." The only control, if any, that Jones, as "fire boss," had of the men was to direct them to leave the place where they were working, and go to another place if their continuance at work in the first place was in his opinion dangerous; but even if we assume that in determining that question and directing the employés by virtue of the authority so given him he would be acting as a vice principal, it does not follow that at the time of the accident he was engaged in the duty required of him as such vice principal. In the situation in which he found the deceased party and the witness Williams, and while they were together up to the time of the accident, he had by virtue of his duties as "fire boss" no right whatever to control their action. Consequently, at that time he did not stand in any such relation to them as would make the company responsible for his acts.

Besides, it clearly appeared that if said Jones was guilty of such negligence as occasioned the accident, the deceased party was guilty of contributory negligence. If any one

had any reason to suspect the presence of dangerous gases at the point where they were, he had under the proof the same reason to suspect its presence. If he did suspect such to be the fact his remaining in that spot for the time he did, engaged in conversation having no reference to the prosecution of the work of the mine, was in itself an act of negligence on his part. If he did entertain such suspicion there is no reason to suppose that Jones did, and in its absence what he did would not necessarily show negligence on his part.

Further, we think it appears affirmatively from the proofs offered on the part of the plaintiffs that deceased actively contributed to the act of Jones, which, it is claimed, led to the accident, by the remark which he made to him just before the explosion occurred. The only reasonable explanation of the action of Jones when he commenced to get up with his lamp above his head is that it was his intention to test the air close to the roof of the passage for the purpose of ascertaining whether or not there was any gas in that locality, and his reply to the remark at that time made to him by the deceased shows that he rested upon the assurance of the deceased that there was no gas there, and that for that reason he could safely open his lamp for the purpose of lighting his pipe without making any further investigation.

On each of the grounds, then — (1) That there was no sufficient proof tending to establish negligence on the part of the company; (2) that if such negligence was shown it affirmatively appeared from the proofs that the deceased contributed thereto — the plaintiff had failed to make a case against the defendant, and the motion for a non-suit should have been granted, and whatever may be held as to the effect upon such motion of the defendant going into its defense, it is clear that it is entitled to the benefit of such motion if, at the time the proofs are finally closed, they

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are not sufficient to establish a *prima facie* case of liability to the plaintiffs.

After a careful examination of all the proofs in the record we are unable to find anything which could in any manner aid the plaintiffs' case. The judgment must be reversed, and the cause remanded with instructions to grant the non-suit, as moved for by the defendant.

STILES and ANDERS, JJ., concur.

SCOTT, J., concurs in the result.

DUNBAR, C. J. (*dissenting*). — I dissent. I think in the first place that the negligence of the respondent was clearly proven. Not only the statutory law but the common law and the law of common justice imposed upon the respondent the duty of protecting its employes from any danger which prudence could prevent.

The testimony shows that the ventilating fan which forced the air into the mine, and which air found egress by passing through the gangway, had not been operated from Saturday evening until Sunday night immediately preceding the explosion Monday morning. It is clear to my mind that if this fan had been kept in constant operation, the gangway in which the plaintiff stood at the time of the accident would have been clear of gas, and the explosion could not have occurred. The duty of the company did not end with operating this fan six days in the week; its duty was to operate it as long as it was necessary to properly ventilate the mine.

There is a weak attempt to make it appear that it was necessary to stop the fan one day out of seven for repairs; but the testimony absolutely fails on this point, and would not amount to a defense if it were true; for if it becomes necessary to stop a fan for twenty-four hours for repairs, the work must stop until such repairs are made and the mine again made safe for occupancy by the miners. The

mine *must* be kept ventilated at all hazards. I do not mean, of course, that the mine owners are absolute insurers or that they should be held responsible for unavoidable accidents which no human wisdom can perceive, or for accidents which the highest degree of human skill or caution cannot avert; but I do say that the commodity of simple convenience, or additional gain or profit, must not be put in the scale to weigh against the safety, health or lives of the operators.

It is a well established principle of law, based on plain common sense, that the care demanded of the employer must be adequate to the nature of the business and the employment; the more dangerous the employment, the greater the degree of care demanded. It needs no testimony to bring the fact to the attention of the court that coal mining is an exceedingly dangerous business; it is a matter of common knowledge forced upon the mind of every person of ordinary intelligence by the too frequent occurrence of appalling disasters, so horrible in their details and so direful in their effects that their mere contemplation, even by strangers who are not directly affected, is sickening in the extreme. In a business, then, where such results are possible, the very highest degree of care must be exerted, and every means and every precaution looking towards the prevention of these disasters must be rigidly employed. The legislature, not only of this state but of nearly every state in the Union where coal mines are operated, have taken legislative notice of the extraordinary perils and dangers incident to this character of business and have passed the most stringent laws for the protection of the lives of the operators, and the courts ought not to relax the rule prescribed by the legislative department. It also appears plainly to me that Jones, the fire boss, was guilty of gross negligence in not testing the gangway before he opened his lamp which caused the explosion. It cannot but

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be admitted in this case that Jones was negligent; but the defense is, that he was a fellow servant of Morgan's, and, therefore, the company is not responsible for his negligence. This doctrine of "fellow servants" has, in my humble judgment, been carried to a ridiculous extreme by the courts, and they have been too quick to aid employers in escaping from responsibilities which every principle of justice demands they should respond to. This rule is a modern one in our jurisprudence, and is founded on the theory that the employé takes the risk of the negligence of his fellow-servant when he accepts the employment; but why he should be supposed to have contracted with reference to the acceptance of this risk any more than a risk incident to defective machinery or many other risks incident to his employment, I have not been able to ascertain, though many attempts have been made by courts and text writers to explain it. One of the reasons most often quoted in sustaining this rule is that announced by Chief Justice SHAW in *Farwell v. Boston, etc., R. R. Corporation*, 4 Metc. 49:

"Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured than could be done by a resort to the common employer for an indemnity in case of loss by the negligence of each other."

The reasons given here, it seems to me, would apply equally as well to any other risk. The employé could as well leave the employment in any case where, in his judgment, the employer did not take such precautions as the

safety of all parties required. The trouble with this doctrine is that it does not take into consideration the very essential and controlling fact, that the workman is made responsible for the conduct of a person whom he does not employ and over whom he can exercise no authority or control whatever; he can neither employ, discharge or direct; all that is left for him, according to the doctrine of the learned judge, is to become a spy upon the action of his fellow servant, and reporter of his delinquencies; and in ninety-nine cases out of one hundred he knows nothing about the neglect of his co-laborer until the accident has occurred, and it is too late to complain. On the other hand, every established principle of agency enters into the relation between the master and the servant whose neglect precipitates the accident and is the cause of the damage. In the first place, the service is rendered for the benefit of the master; he is the recipient of the profits accruing from such service; he employs the servant and pays him for the service rendered; he can discharge him at will; he can advise, direct and absolutely control him in the performance of his duty; it is he who examines the servant when he applies for the position, and he alone who has the opportunity or right to inquire into or pass upon his qualifications. Surely if the rule were founded, as it should be, on the expediency of placing the risk upon the party who can best guard against it, it takes but a limited intelligence to discern the fact that the master is the directing mind who controls the risk. But all these universally received tests of agency are brushed aside before the nebulous theory that the servant impliedly agrees when he applies for work to take the risk of the neglect and unskillful acts of those with whom he is not acquainted, and over whose actions he has, and can have, no control, and this agreement, which he never made nor had any intention of making, is imported into his contract by the arbitrary authority of the courts

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—a purely fictitious contract which exists only in the judicial imagination. Courts should approach the duty of importing implications into contracts with great caution, lest construction be supplanted by manufactory, and a contract be made for the parties essentially different from the one they made for themselves.

If the knowledge of the negligence of a fellow servant can be brought home to the laborer, and in the face of a known danger he proceeds with his employment, then, by the same principle that governs in cases of apparent injury, of course he should not recover, for every man should make use of his ordinary faculties in protecting himself from injury, and, if, seeing the danger, he sees fit to rush into it, or obstinately or carelessly shuts his eyes when his duty is to observe, he has no one to blame but himself, and must suffer the consequence; but from every consideration of justice I insist that no man should be held responsible for the acts of those over whom he has no direction, authority or control. But diverse as opinions of courts are upon the question of who are fellow servants, I think very few, if any, have carried the doctrine to the extent that has been announced by the majority opinion in this case. Fellow servants are they who are employed in a common occupation by a common master; and must, in my judgment, have equal authority. When one employed has authority to direct and control another, the relation of fellow servant cannot exist. It is not only contrary to the plain and obvious meaning of the expression, but it is repugnant to our sense of justice, that a person should be held responsible for the faults of one, not only whom he cannot control, but who has authority to control and direct him, and to whose judgment it is his duty to defer, and whose orders it is his duty to obey; one who is employed by the master as an agent because of superior qualifications, receiving better wages on account of such superior qualifications, who stands

in the place of the master, especially commissioned to carry the will of the master into effect; in every sense an *alter ego*, or vice master. In this case, Morgan, the common laborer, had not the same authority as Jones, the fire boss; Morgan was a common miner, and received the wages of a common miner, while Jones held the superior and more responsible position—a position which Morgan could not, in any probability, have attained to. It was a position requiring a certain degree of technical knowledge, and while it may be that Morgan, when he applied for the position of miner, may be held to have contracted with reference to his qualifications as a competent miner, upon what principle of law or ethics can he be held to have contracted with reference to the qualifications of Jones, whose duties were entirely distinct? He had as much right to rely on the duty of the master to furnish a fire boss who was qualified to rightly perform the duties of his office, as upon the duty of the master to furnish suitable and safe machinery. It was the duty of the fire boss to inspect the mine for gas, and direct the men with reference to their work, as affected by the presence or absence of gas. It was the duty of the men, of course, to submit to his direction. Morgan had submitted to it and had gone into the gangway where he was directed; whether he was talking about the business of the mine or about his own private business, at the time of the accident, is of no consequence whatever. He was rightfully in the place designated by the company, awaiting until his chute should be relieved of gas.

So far as any question of contributory negligence is concerned, the testimony is conflicting, and the jury have weighed the testimony and found there was not; and there being no undisputed facts which, as a matter of law, would constitute contributory negligence, I think the judgment should be affirmed.

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[No. 841. Decided June 30, 1898.]

THE STATE OF WASHINGTON, *Respondent*, v. THOMAS DEVINE AND JOHN DOE, *Appellants*.

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34*	154
35*	357
6	587
12	419

INFORMATION—SUFFICIENCY OF—VERIFICATION BEFORE DEPUTY COUNTY CLERK.

An information is sufficient to show that the prosecution is in the name of the state when the caption of the information entitles the case as the "State of Washington against" the defendants, naming them.

When the verification to an information is made by the prosecuting attorney before the deputy county clerk, it is proper that the jurat should be signed by such officer in his own name; and it is unnecessary that he sign, in such case, in the name of his principal by himself as deputy.

Appeal from Superior Court, Whatcom County.

Oval Pirkey, for appellants.

Thomas G. Newman, Prosecuting Attorney, for The State.

The opinion of the court was delivered by

HOYT, J.—There was a suggestion by the appellants at the oral argument that the information was void for the reason that it did not appear therefrom that the prosecution was in the name or on behalf of the state. This objection was not made in the brief of appellants, and for that reason they were not entitled to be heard in regard thereto, but in view of the fact that the argument went to the extent of claiming that by reason of such omission the court never had any jurisdiction of the subject matter, it is best that we should pass upon the objection. In the caption of the information the case was entitled as the State of Washington v. the defendants, naming them, and we think that thereby it was sufficiently shown that the

prosecution was in the name of the State of Washington, and that the information was sufficient so far as that point is concerned.

The only other question presented for our determination is as to the sufficiency of the jurat of the officer before whom the information purported to have been verified. Such jurat is signed by the deputy county clerk of Whatcom county in his own name without any reference therein to his principal, and it is claimed on the part of the appellants that such being the fact it is as though no jurat whatever had been attached to the verification, and that the information stands as an unverified one. There is some question whether or not we would set aside a conviction regularly obtained in all other respects for the simple reason that the information upon which the trial was had had not been verified by the prosecuting attorney, but it is not necessary that we should decide that question now. It is conceded by the appellants that the person before whom the verification of the information was had was, as deputy county clerk, duly qualified to administer oaths, and that if he had done so in the name of his principal by himself as deputy the verification would be as good as though taken before the principal himself. Upon principle, we are unable to see any reason for the distinction claimed by the appellants. If the deputy is authorized to administer the oath, and the person appears before him and is sworn, it is in fact a good verification, and to hold that the validity thereof is destroyed because the officer thus authorized to administer the oath signs in his own official capacity, rather than that of the official capacity of his principal, would to our minds be a yielding of all substance to the merest shadow of a technicality. It is not by virtue of the official character of his principal that he is authorized to administer the oath, but by virtue of his own official character as a deputy, and in our opinion it is not only proper

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Opinion of the Court—Hoyt, J.

that he should sign in his own official capacity but much more appropriate than to do so in the name of his principal. Not only is the action of the deputy in this case sanctioned by reason, but it is also fully sanctioned by the great weight of authority. In some of the cases it has been held that a jurat signed either in the name of the principal or that of the deputy was good; in others, that it must be signed in the name of the deputy who by law was authorized to administer the oath. And the industry of the appellants has not enabled them to bring to our attention a single case which holds that where the deputy is by virtue of the statute authorized to administer an oath that his attestation thereof should be made in the name of his principal rather than his own. The only cases which they have cited are those which hold that a deputy sheriff in serving and making return of process must do so in the name of his principal, and not in his own name. But these cases are easily distinguished from the one at bar. The most of them are from the State of California, but that they are not authority in the case at bar is fully shown by other and later cases from that state in which it has been expressly held that a deputy clerk possessed all the powers of the clerk, and could act in his own name or that of his principal. See *Touchard v. Crow*, 20 Cal. 150; *Muller v. Boggs*, 25 Cal. 186. See, also, Mechem on Public Officers, § 570; *Calender v. Olcott*, 1 Mich. 344; *Wheeler v. Wilkins*, 19 Mich. 78; *Westbrook v. Miller*, 56 Mich. 148 (22 N. W. Rep. 256); *State v. Barrett*, 40 Minn. 63 (41 N. W. Rep. 459); *Herndon v. Reed*, 82 Tex. 647 (18 S. W. Rep. 665).

Some of these cases not only hold a verification like the one under consideration good, but go further and hold that it would be ridiculous to say that such oath was sworn to before the principal by the deputy, when in fact the deputy was the only person having any connection whatever with

the transaction, and his authority was derived directly from the statute, and not in any sense from such principal.

The judgment and sentence must be affirmed.

DUNBAR, C. J., and STILES, ANDERS and SCOTT, JJ.,
concur.

[No. 874. Decided June 30, 1893.]

M. J. CARRIGAN, *Respondent*, v. THE PORT CRESCENT IMPROVEMENT COMPANY, *Appellant*.

CORPORATIONS—AUTHORIZATION OF CORPORATE ACTS—PRESUMPTION.

When a corporation names some person as its manager, and as such allows him in a large measure to control all its business transactions, it must be held responsible for the acts of such manager in the name of the corporation, until it has been affirmatively shown that such acts were unauthorized.

Appeal from Superior Court, Clallam County.

George C. Hatch, and Harry E. Lutz, for appellant.

Benton Embree, for respondent.

The opinion of the court was delivered by

HOYT, J.—All of the errors assigned by appellant, excepting those relating to the evidence offered in opposition to its own claim of offset, were founded upon the rulings of the court upon objections by the appellant to the introduction of evidence to show that the contract sued upon, which purported to be executed by John E. Lutz, its manager, was so executed by him by express authority of the board of directors, or that it had been fully ratified by the action of the company. Before the introduction of any

6 590
11 416
34* 148
39* 673

6 590
14 559
6 590
125 483

6 590
130 153
81 440

June, 1893.] Opinion of the Court — HORT, J.

such testimony the plaintiff had shown that the contract in question had been in fact signed in the name of the company by said Lutz as its manager, and that said Lutz was in fact the acting manager of the company, having control of all, or nearly all, of its transactions. Under these circumstances it will be presumed that it was the contract of the corporation until the contrary is made to appear. When a corporation names some person as its manager, and as such allows him in a large measure to control all its business transactions, it must be held responsible for the acts of such manager in the name of the company until it has been affirmatively shown by it that as a matter of fact such acts were unauthorized. This is, perhaps, an extension of the general rule, but, in our opinion, such extension is necessary to prevent great hardships being cast upon those who deal with corporations. The very use of the word "manager" as applied to the officer conveys the idea to the ordinary mind that to one thus named has been committed the management of the affairs of the company. And to hold that one dealing with a person so held out must, before the company can be held liable for his acts, show affirmatively that it had authorized them, would often result in great hardship. The books of many of the smaller corporations are very imperfectly kept, and from them it is sometimes impossible to determine as to just what authority is vested in the manager, and to require of one who deals with the corporation to show affirmatively the authority thus given would often require of him something that it was next to impossible for him to ascertain. But if we hold that the acts of the person thus held out as manager are *prima facie* those of the company, but that such presumption can be rebutted by affirmative proof on its part that in fact they were unauthorized, it will greatly subserve the public interest and convenience and at the same time impose no hardship upon the corporation. The corpora-

tion can much better be charged with knowledge of what its books show than can one dealing with it. And if in fact the act of the manager has never been authorized by the company it will be easy for it to show such fact, and thus overthrow the *prima facie* presumption of liability arising from his having acted in the name of the company. This has been held to be the rule in many of the courts when the act of the officer is authenticated by the seal of the corporation, but we see no reason whatever in the manner in which corporations now so largely transact their business, to draw any distinction between a contract executed by an officer and authenticated by the seal of the corporation and one not so authenticated.

It follows that the plaintiff had made a *prima facie* case before the offer of any of the evidence to which objection was made, and the defendant having put in no proof tending to rebut it, all such evidence was absolutely harmless as it could not affect adversely any right of the defendant.

As to the exceptions growing out of the claim of offset set up in appellant's answer, we have carefully examined all the proofs offered in regard thereto, and we think the finding of the court was abundantly warranted by competent testimony contained in the record, and such being the case his findings thereon are conclusive upon us.

We find no error of record which could have affected adversely any right of the defendant, and the judgment against it must be affirmed.

DUNBAR, C. J., and STILES, SCOTT and ANDERS, JJ.,
concur.

June, 1898.] Opinion of the Court.—HOYT, J.

[No. 896. Decided June 30, 1893.]

F. M. DUGGAN, *Respondent*, v. THE PACIFIC BOOM COMPANY AND ADOLPH BEHRENS, *Appellants*.

CORPORATIONS—UNAUTHORIZED ACTS—ESTOPPEL—INSTRUCTIONS.

In an action upon a note of a corporation signed in its name by its president and secretary, but for which there was no express authorization of the company, the company is estopped from asserting that the officers acted outside of their authority, when all the business of the company, including the making of numerous notes of the kind in question, had been for a long time transacted by said officers, and informally ratified by the company by its action in paying the same, no fault ever being found with the action of such officers in so conducting the business.

Where an instruction, taken altogether, fairly informs the jury of the law, it will be upheld, although separate clauses in themselves may be misleading.

Although a defendant may be entitled to have a certain requested instruction given for the purpose of making more definite a matter touched upon by the court in its charge, yet, if he embodies with that instruction other matter that is improper, it is not error for the court to refuse to give the instruction as a whole.

Appeal from Superior Court, Skagit County.

Dunning, Richards, Murray & Pratt, for appellants.

Million & Houser, and *D. H. Hartson*, for respondent.

The opinion of the court was delivered by

HOYT, J.—This action was brought to cover an amount alleged to be due upon a note purporting to be that of the appellant, the Pacific Boom Company. It was signed in its name by its president, and secretary and treasurer. The defense of the appellant was that the officers of the company who executed the note were not authorized so to do by any formal action on the part of the board of trustees, nor had there been a ratification of their action by the

6	593
7	489
34*	157
35*	377
6	593
11	416
34*	157
39*	673
6	593
13	603
6	593
26	686
6	593
30	34
31	19
6	593
33	489

company. And further, that at the time such note was given, the company was not indebted to the plaintiff, and that there was no consideration therefor.

Upon the question as to the authorization of the officers to execute the note, it appeared from the undisputed proofs in the record that there was no express authorization or ratification of such action on the part of the company. It, however, appeared that all the business of the company, including the making of numerous notes of the kind in question, had been for a long time transacted by said officers, and informally ratified by the company by its action thereon in paying the same, and in other respects. The record shows that not only had this been occasionally done, but that such was the universal course of business with the company. From such proofs it appears that to all intents and purposes the business of the company had been transacted by the two officers who signed the note in question, and that, although this course of business had been continued for a long period, no fault had ever been found with the action of these officers in so conducting the business.

Under these circumstances we think that the jury were justified in finding that the company was estopped from asserting the fact that the officers, in executing the note in question, acted outside of their authority as such. And in our opinion the instruction of the court upon this subject fairly submitted this question to the jury, for while it is true that there seems to be no affirmative proof to justify the court in saying that the company would be estopped under the circumstances shown by the record if the plaintiff relied upon such practice and custom, yet we think that under the circumstances proven there arose from the course of practice a presumption that all who dealt with the company relied thereon, and that for that reason that part of the instruction had a foundation in the proofs, and if it

June, 1898.] Opinion of the Court—HOTT, J.

did have, it is conceded by the appellant that the law of the case was fairly expressed therein.

There are two other exceptions which it is necessary to notice, and they may well be considered together.

The court instructed the jury as follows:

“Now, I instruct you, as a matter of law, the taking of a note from a third person, as in this instance, the taking of the note of Mr. Behrens by Mr. Duggan at the time of delivering up the first note, is not in itself a payment of the debt; but the fact that the plaintiff had a note of the company and delivered that up and took Mr. Behrens' note is a circumstance which you can take into consideration in arriving at the question of whether Mr. Duggan released the boom company and took Mr. Behrens for the debt, and it is for you to determine, gentlemen of the jury, under all the evidence and the instructions given you by the court, whether Mr. Duggan accepted Mr. Behrens and released the boom company from this obligation. If Mr. Duggan, in accepting the note of Mr. Behrens, did not release the boom company, as I have instructed you before, it is not a payment of the debt, and, consequently, the boom company would be liable upon the note, if you find, under the evidence and the instructions of the court that this note has been legally executed.”

To the giving of this instruction the appellant excepted. The court also refused to give the following instruction asked for by the appellant:

“The taking of Behrens' note and surrendering the company note was presumptive evidence of payment and extinguishment of the original debt between plaintiff and the Pacific Boom Company. If you believe from the evidence that the note sued upon was given in payment or exchange for the private debt of A. Behrens, then you are instructed that such a transaction was unlawful so far as this company was concerned, and your verdict should be for the defendant Pacific Boom Company.”

The instruction given, when fairly construed and taken altogether, does not so misstate the law as to lead us to

believe that the jury were misled thereby. It is true that the clause, "The taking of the note of Mr. Behrens by Mr. Duggan at the time of delivering up the first note, is not in itself a payment of the debt," if unexplained, would be erroneous, but such language, when taken in connection with that of the remainder of the instruction, fairly conveyed to the jury the idea of the court that such fact alone did not conclusively show a payment of the original debt. And thus interpreted it stated the law of the case.

There are a few cases going to the extent of holding that the taking of a note of a third person from a debtor is conclusive evidence of the payment of the debt when such debtor does not endorse the note of such third person, but the weight of authority is in favor of the proposition that the intent of the parties at the time of the transaction must govern, and if it appears that at the time such note was taken it was not the intent of the parties that it should be received as an absolute payment of the existing indebtedness, then in case of the non-payment of such note the payment of the original indebtedness could be enforced. Taking the whole instruction under consideration together, we think the jury were sufficiently informed of this rule of law. If the appellant had desired that the instruction should be more definite as to any particular point, it should have requested a proper instruction in regard thereto. This it attempted to do as to one particular point in the request above set out, and had it been content with asking the court to give the first clause of such instruction it would have probably been entitled to have had the same given to the jury, as the giving thereof would have made more certain the intention of the court in the instruction which we have been considering. Appellant, however, saw fit to couple this clause with another, which, in our opinion, it was not entitled to have given to the jury, and embody both clauses in a single instruction, and having

June, 1893.]

Syllabus.

done so it cannot now avail itself of an exception to the refusal of the court to give such instruction as a whole. The latter part of the instruction so requested ignores the fact that a proper consideration might have moved at the time of the execution of the new note from Behrens to the company, and that for that reason the note be given not for the accommodation of Behrens but for the accommodation of the company, and in the prosecution of its own business in the manner in which the proofs show it had been accustomed to do it.

We find no error in the record of sufficient magnitude to justify a reversal of the judgment, and it must, therefore, be affirmed.

DUNBAR, C. J., and STILES, ANDERS and SCOTT, JJ., concur.

[No. 903. Decided June 30, 1893.]

PORT TOWNSEND NATIONAL BANK, *Respondent*, v. PORT TOWNSEND GAS AND FUEL COMPANY AND SAMUEL T. DOUGLASS, *Appellants*.

CORPORATIONS—TRANSFER AND PLEDGE OF STOCK—WANT OF RECORD—EFFECT OF JUDICIAL SALE AGAINST STOCKHOLDER.

The transfer by a stockholder of his shares of stock in a corporation, although no registration has been made thereof on the books of the corporation, will pass the title thereto to the transferee as against a subsequent purchaser on execution sale against the transferer.

Under §2432, Code 1881, the interest of a pledgee in shares of stock in a corporation cannot be divested by judicial sale against the owner thereof, although such shares have not been transferred to the pledgee on the books of the corporation.

6	597
18	14
6	597
134	13

Appeal from Superior Court, Jefferson County.

Ballinger & Loughary (Samuel T. Douglass, of counsel),
for appellants.

Carroll & Rohde, and *R. W. Jennings*, for respondents.

The opinion of the court was delivered by

HOYT, J.—This is a controversy as to fifty shares of the capital stock of the defendant corporation as between the respondent corporation and the appellant Samuel T. Douglass. The respondent claims as the purchaser of the shares at an execution sale, as the property of the person in whose name such shares were standing on the books of the corporation at the date of such sale. The appellant Douglass claims as pledgee of the same person. The certificates for said shares were, by such owner, endorsed and delivered to such pledgee as security for a certain sum of money. The lien of the execution sale at which the respondent purchased went back to the date of the levy by attachment, at which time the respondent had no notice of said appellant's interest in the shares or of the same having been in any manner transferred by the record owner thereof, but it did have such notice before the date of the execution sale. We are called upon to decide under these circumstances to whom in equity these shares belonged, it being conceded for the purposes of this decision that the pledgee's interest, if he has any at all, is sufficient to absorb the entire value of the stock.

Sec. 2429 of the Code of 1881 provides as follows:

“The stock of the company shall be deemed personal estate, and shall be transferable in such manner as shall be prescribed by the by-laws of the company; but no transfer shall be valid except between the parties thereto, until the same shall have been entered upon the books of the company, so as to show the names of the parties by and to

whom transferred, the numbers and designation of the shares and the date of the transfer.”

And § 2432 as follows:

“Any stockholder may pledge his stock by a delivery of the certificate or other evidence of his interest, but may, nevertheless, represent the same at all meetings and vote as a stockholder.”

There is a further provision in the sections contained in the same chapter as the ones above set out, that the books of the corporation containing the record of shareholders shall be open at all proper hours for the inspection of any of the stockholders or creditors of such corporation; but there is nowhere in the statute law of the state any provision which gives any other person than a stockholder or creditor of the corporation any right of access to such books.

Three questions are thus fairly presented to us for decision — (1) Does a transferee of shares of stock of a corporation in this state take title to such shares as against a creditor of the transferer before the registration of such transfer in the books of the corporation? (2) If, in the absence of notice of such transfer before the execution sale, he does not, will the fact that notice of his interest is given before such sale avail him in aid of his title? (3) If both of the above questions are decided adversely to the rights of such transferee, does a pledgee of such stock occupy any better position?

Nearly all of the states in the union have statutory provisions resembling those of our own upon this subject, and the course of decisions thereunder has not been entirely uniform, yet we think a careful investigation of all the cases will show that where the statute contains substantially the same provisions as ours, and does not contain any additional provisions whereby all persons interested have a right of access to the records of stock of the corpo-

ration, it has been almost universally held that an unrecorded transfer is good as against a purchaser at execution sale against the owner of record, even although such purchaser has no notice whatever of such transfer. The courts of a very great majority of the states in the union have announced this doctrine, and many of them have done so when interpreting statutes having much more positive provisions about the recording of such transfers and their invalidity if not so recorded than those of our own. We shall not attempt to discuss these cases at any length; they are too numerous.

The principle upon which a majority of the decisions seems to rest is, that by the expressed provision of the statute the transfer between the parties is good, and that since the general rule in equity is that a purchaser at a judicial sale will take the real, instead of the apparent, interest of the judgment debtor, it follows that by the application of such rule the purchaser at a sale of such stock would in equity take only such interest therein as the judgment debtor had at the time the lien enforced by the execution sale attached. It is true that our statute provides that these transfers shall not be valid excepting as between the parties until the record thereof is made, but a fair construction of this provision, in the light of those as to who are entitled to examine such record, is that such invalidity only exists in favor of the corporation or its creditors. They are the only ones who are enabled to ascertain anything about the ownership of the stock from the books, and for that reason it must be held that it is in their interest alone that such books are required to be kept and the transfers made of record thereon, and it would be illogical to hold that a record in a book which was in no manner kept for the benefit of the creditors of a stockholder should in any manner avail him to defeat a transfer which by the statute is made good as between his

debtor and the person to whom he transfers the stock. Where, by express language, the statute of the state had declared that an unrecorded transfer should not be valid for any purpose whatever until recorded, or that a transfer of the stock could only be made by certain formalities, among which was that of having it recorded in the transfer book, the courts were no doubt justified in holding that until such record had been made there had been no transfer at all, even as between the parties; or where the language as to the transfer and record thereof was similar to ours, but the statute contained an additional provision that the record book of such transfers should be open to the inspection of any person, it has been well held that such statutes construed as a whole made the transfer book a public record, and that an entry thereon of a transfer was as necessary to sustain the title of the transferee as the recording of a chattel mortgage or bill of sale to sustain it when such record is made a necessary requisite to the perfection of the title of the holder thereunder. But none of these cases are of any value under a statute like ours, and we can see no reason whatever for holding that by reason thereof there has been any change made in the general rule as to what interest of a debtor is reached by a sale on execution against him.

It is not necessary that we should say much as to the second question above stated. It is proper, however, to observe in regard thereto that among the few courts which have, under statutes similar to ours, held the title of the purchaser at the execution sale good as against an unrecorded transfer, are those of the State of California, in which state it has been expressly held that if at the date of the sale the purchaser had notice of the equities of the transferee he would take subject thereto, so that if we were to adopt the California rule it would not aid the contention of the respondent.

It will be seen from the above that, in our opinion, a transferee takes a good title, but even if he did not, it is clear to us that under the provisions of § 2432 above cited, a pledgee's interest could not be divested by an execution sale. Said section seems to clearly intend that a stockholder may pledge his stock, and yet to all intents and purposes as between himself and the company and his fellow stockholders, be treated as the owner thereof. This could not be if the pledgee in order to protect himself was compelled to have the assignment regularly made to him, and a transfer thereof recorded in the books of the corporation, for so soon as that was done he would become, as between himself and the corporation, the owner of the stock. The suggestion of the respondent, that the transfer thus to be recorded might be a conditional one setting out the facts, does not meet with our approval for the reason that it would so complicate the question of the title to the stock as between the corporation and its stockholders as to seriously interfere with the business of the corporation. A great deal might be said in favor of the construction which we have above given to our statute growing out of the history of the growth of transactions in the stock of corporations. It is a matter of common knowledge that shares of stock in corporations of all kinds are treated as personal property transferable by endorsement and delivery, and from the very necessities of the business of a corporation, in the manner in which all corporations are now conducted, that rule which will most encourage the transfer of their stock and give to certificates as much as possible the character of commercial paper will best subserve the public interests. We do not, however, feel called upon to enter upon any elaboration of this subject. We think that the application of well settled rules of construction, when applied to our statute, will warrant the conclusion to which we have arrived.

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July, 1893.] Opinion of the Court—Hoyt, J.

The judgment must be reversed, and the cause remanded with instructions to dismiss the action.

DUNBAR, C. J., and STILES, ANDERS and SCOTT, JJ.,
concur.

[No. 540. Decided July 6, 1893.]

AUG. MANSFIELD, *Assignee of Burrows & Anderson, Appellant*, v. THE FIRST NATIONAL BANK OF WHATCOM
AND R. L. SABIN, *Respondents*.

COSTS—MONEYS DEPOSITED IN COURT—LIABILITY OF PARTIES.

Where, in an action for the recovery by an assignee of the proceeds of certain goods converted into money, judgment is given for the assignee, he is entitled, as an incident to the judgment awarding him possession of such money, to a judgment also for his costs.

Where certain goods in controversy have been converted into money, which has been placed in possession of an officer of the court by consent of all parties to the action, and the only question to be decided is as to which of the parties should receive said moneys from such officer, neither party can be held responsible for the safe keeping of such moneys as against the other.

Original Application for Mandamus.

Bruce & Brown, for appellant.

Cole & Romaine, Cox, Teal & Minor, and *Kerr & McCord*, for respondents.

The opinion of the court was delivered by

HOYT, J.—The application for a writ of *mandamus* must be denied. The judgment which relator seeks to compel the lower court to enter is not authorized by the decision of this court. The opinion heretofore rendered (5 Wash. 665, 32 Pac. Rep. 789) clearly shows that this court recog-

nized the fact that it appeared from the record that the goods as to the custody of which the original controversy was commenced had been converted into money, and that the proceeds were in the hands of an officer of the court by consent of all the parties to the action. Such being the case, it must be held in all proceedings after such conversion that the money took the place of the goods, and that as it was in the hands of an officer of the court by consent it was as much at the risk of one party as of the other. And in all litigation thereafter the only question to be decided was as to which of the parties should receive said moneys from such officer, and that thereafter neither of them could be held responsible for the safe keeping thereof as against the other.

It will thus be seen that the judgment which the petition and answer show that the court below was willing to enter was substantially the one directed by this court, with the exception that it does not appear that it proposed to enter a judgment in favor of the assignee as against the other parties to the action for costs. But from what was said upon the argument we are satisfied that a bare suggestion will induce the court below to so modify its judgment entry as to cover the question of costs. It is clear that since, if the goods had not been converted into money, the assignee would have been adjudged to be entitled to the possession thereof, and as an incident to such judgment would have recovered his costs against the adverse parties, he is entitled, in addition to having the proceeds of such goods turned over to him, to have judgment for his costs.

DUNBAR, C. J., and SCOTT and ANDERS, JJ., concur.

STILES, J., not sitting.

July, 1893.] Opinion of the Court—DUNBAR, C. J.

[No. 694. Decided July 6, 1893.]

D. B. SHEPARD AND J. D. MOODY, *Respondents*, v. A. P. HILL AND J. LORING WHITTINGTON, *Appellants*.

PARTIES—DEFECT OF PARTIES PLAINTIFF—ESTOPPEL OF DEFENDANT—REAL ESTATE BROKERS—AGENT OF BOTH PURCHASER AND SELLER—NON-SUIT.

Where a person is joined as a party plaintiff in an action by an amended complaint, after the answer of defendants had averred such person had an interest in the controversy, the defendants cannot afterward, on appeal, raise the objection that such additional party plaintiff is not a party in interest.

A real estate broker, who secretly acts as the agent both of the purchaser and of the seller in a sale of land, is guilty of constructive fraud, and is not entitled to recover commissions from the seller; and should be non-suited in an action for commissions, if such fact sufficiently appears from the evidence.

Appeal from Superior Court, King County.

Bausman, Kelleher & Emory, for appellants.

Thompson, Edsen & Humphries, for respondents.

The opinion of the court was delivered by

DUNBAR, C. J.—In discussing this case we shall proceed on the theory that Shepard and Moody are proper parties plaintiff in this action. The action was originally begun by Shepard, but appellants answered, averring the fact to be that Moody had an interest in the controversy, and that Shepard was not the sole party in interest. Upon this suggestion in the answer, and after consultation with Moody, the fact was conceded by the respondent, and an amended complaint was filed in which Moody was made a party to the action, and appellants will not now be heard to raise the objection that Moody is not a party in interest. Besides, the testimony shows that Shepard and Moody

6	606
32	236
6	606
633	436
6	605
42	291

were to share alike in the benefits flowing from the business.

We will not enter into any discussion of the question as to whether the land sold was actually sold to Hawley or to Elliott. If sold to Elliott then of course it follows, and is conceded by the respondents, that this case must fail; but that question was submitted to the jury, the testimony is conflicting, and the jury evidently believed that the sale was made to Hawley. There is sufficient testimony to sustain this finding, and this court will not disturb it. But conceding that the sale was made to Hawley it seems to us that it is not only shown by the whole testimony, but that it is conclusively shown by the testimony of the plaintiffs, that this is a case of a broker obtaining a commission from two employers whose interests are antagonistic, and that the plaintiffs by their own showing prove themselves the agents both of Hawley, who desired to purchase, and of Hill & Whittington, who desired to sell, and are, therefore, guilty of constructive fraud.

We think there can be no controversy about the correctness of the proposition that a broker who is in the secret employ of both parties cannot obtain a commission from either. This rule is based upon the principle governing agency, viz., that an agent owes his whole duty to his principal, and it is easy to realize the fact that he cannot exercise his whole duty to two principals whose interests in the subject matter of the agency are conflicting. If plaintiffs were employed by Hawley to purchase land for him they became his agents for that purpose, and if they were employed by defendants to sell the same land, they also became their agents, and plainly they could not do their whole duty to either of their principals. It makes no difference in principle that the defendants did not own the land, but that they were employed by the owners to sell it. Their chances of selling would naturally be dimin-

July, 1888.] Opinion of the Court—DUNBAR, C. J.

ished if the purchaser, in addition to the price asked by them, had to pay a percentage to their agent. In this case the land to Hawley was five per cent. higher than it would have been if plaintiffs had not been employed by him. The chance of his purchasing was lessened in that proportion, hence the plaintiffs did not do their duty to their principals, the defendants; so, too, on the other hand, they failed to do their whole duty to their other principal, Hawley; they became, in fact, both purchasers and sellers, dual capacities which the policy of the law condemns. When a man is entrusted with the business of another he will not be allowed to prejudice his employer's interest by so representing the business that he will realize something out of it for himself outside of the remuneration of the employment. Or, as was more forcibly expressed in 8 Tomlins Brown, 72:

“The ground on which the disqualification rests is no other than that principle which dictates that a man cannot be both judge and party. No man can serve two masters; he that is entrusted with the interests of others cannot be allowed to make the business an object of interest to himself, because from a frailty of nature one who has the power will be too readily seized with inclination to use the opportunity for serving his own interest at the expense of those for whom he is entrusted. The danger of temptation from the facility and advantage for wrongdoing which a particular situation affords does, out of the mere necessity, work a disqualification.”

It is unnecessary, however, to enlarge on this principle; or to quote authorities in support of it, as it is conceded by the respondents that such is the law governing the case where a property owner employs a broker to sell real estate for him, and where the broker secretly takes employment from the person to whom he is going to sell real estate, and thereby serves two masters for the purpose of doubling his commission; but they insist that this

case is easily distinguished from that kind of a case, and that this is simply the kind of a case where one is employed to introduce the buyer and seller, in which case it is undoubtedly the law that the middleman is entitled to receive a remuneration from both buyer and seller. Several cases are cited by respondents in support of this doctrine, but as we understand the evidence in this case, neither the facts nor the reasoning of those authorities will apply to the case at bar. From the plaintiff's own testimony they *did* have something else to do than to introduce the buyer or seller or bring them together; they plainly undertook with one party to buy, and with the other party to sell. Indeed we should judge from the complaint itself that the action was brought on the theory that plaintiffs were land brokers, and were employed to sell the land in question. Certain it is that the testimony of the plaintiffs (not taking into account the testimony of the defendants) conclusively shows that they understood the fact thoroughly, that they did do something else than to introduce the buyer and seller; they submitted the land to Hawley and submitted the price to him, and did everything they could to make a sale. They boldly testify that they did not intend to reveal the name of the purchaser until they knew whether he intended to purchase. There is nothing in the testimony to distinguish their actions from the actions of the ordinary land broker who is employed to sell, excepting that their direct employers did not own the land, which, as we have before said, does not change the principle governing this case.

Defendant's motion for a non-suit should have been granted, for there was sufficient uncontradicted testimony to show that plaintiffs were secretly in the employ of both buyer and seller, and if the jury had been properly instructed concerning the law governing such cases the verdict should have been for the defendants in this case. This

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case would have to be reversed in any event, for the instructions complained of by appellants are palpably erroneous, and we think the exceptions taken by the appellants were as definite as the manner in which the instructions were given by the court would allow; and inasmuch as the facts testified to by the plaintiffs in our judgment preclude them from a recovery, the non-suit should have been granted.

The judgment is, therefore, reversed, and the cause remanded with instructions to grant the non-suit asked by the defendants.

STILES, ANDERS, HOYT and SCOTT, JJ., concur.

[No. 808. Decided July 6, 1898.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES H. BROWN, *Appellant*.

RESISTING OFFICER—SUFFICIENCY OF INFORMATION—EVIDENCE.

Although the information in a prosecution for resisting an officer does not allege that defendant knew that the officer was a deputy sheriff, when he resisted him, yet, if such knowledge on the part of the defendant sufficiently appears from the reading of the information as a whole, the information is sufficient, under the code, to sustain a verdict, the defendant having gone to trial without interposing a demurrer.

In a prosecution for resisting an officer in the service of a legal warrant, a statement of the facts constituting its legality is better pleading than to allege that the warrant was a legal warrant.

In such a case, where the information alleges that the warrant was issued by a justice of the peace for a certain precinct and county for the arrest of defendant, the fact that in the warrant offered in evidence there were other names mentioned in addition to defendant's, does not constitute a prejudicial variance.

Appeal from Superior Court, Jefferson County.

R. W. Jennings, for appellant.

Thomas Fitzgerald, for The State.

The opinion of the court was delivered by

DUNBAR, C. J.—Appellant was tried and found guilty of resisting an officer. The information on which the conviction was based is as follows:

“Comes now R. E. Moody, prosecuting attorney in and for Jefferson county, State of Washington, and by this information informs against, charges and accuses Charles Brown with the crime of resisting an officer, committed as follows, to wit: The said Charles Brown, on the 5th day of September, A. D. 1892, in the city of Port Townsend, county of Jefferson, State of Washington, then and there being, did then and there knowingly, willfully and unlawfully resist him, one William J. Jones, a deputy sheriff of Jefferson county, State of Washington, duly appointed, qualified and acting as such, while the said William J. Jones as such deputy sheriff aforesaid was serving a warrant charging said Brown with a crime against the laws of the State of Washington, which warrant was duly and regularly issued from a justice of the peace court for the precinct of Port Townsend, Jefferson county, Washington, before and by Oliver Wood, justice of the peace, for the arrest and apprehension of the said Charles Brown, and in attempting to read said warrant to said Brown by said Jones as such deputy sheriff, said Brown assaulted said Jones, said deputy sheriff, by then and there striking said Jones, said deputy sheriff, with his fist and knocking said Jones down, and by drawing a pistol by said Brown upon said Jones, said deputy sheriff, and pointing said pistol at the person of said Jones, said deputy sheriff, all of which is contrary to the statute in such cases made and provided and against the peace and dignity of the State of Washington.”

Appellant contends that the information fails to charge a crime, in that it nowhere alleges that defendant knew

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Jones to be a deputy sheriff, and further that the information does not allege that the warrant was a legal warrant. This information is probably not as definite as informations of this character generally are, yet under the liberal provisions of our code we think it is sufficient to sustain a verdict, defendant having gone to trial without interposing a demurrer thereto. The act, which constitutes the crime, is set forth in such a manner as to enable a person of common understanding to know what is intended, and with such a degree of certainty as to enable the court to pronounce judgment upon a conviction according to the right of the case, and that is all that is requisite so far as describing the act is concerned. It is true the information does not say in so many words that defendant knew Jones to be a deputy sheriff when he resisted him, but that knowledge on the part of the defendant sufficiently appears from the reading of the information as a whole, or at least it appears that it was a *de facto* officer who was trying to read the warrant to him, and who was prevented from doing so by defendant's acts.

As to the second objection, the information alleges that the warrant was duly and regularly issued by a justice of the peace court, describing the court, and that it charged the defendant with a crime against the laws of the State of Washington. This would make a legal warrant; and the statement of facts constituting its legality is better pleading than to plead the conclusion of law.

We think appellant's objection to the sufficiency of the proof is equally groundless. The information alleged that the warrant was issued by Oliver Wood, justice of the peace for a certain precinct and county; the warrant offered in proof corresponded substantially with the allegations. There is nothing in the objection that the warrant described by the information was not the same warrant introduced in evidence. It was a warrant against each person named

therein, and the fact that there were other names mentioned in the warrant besides the name of the appellant could in no wise prejudice appellant nor affect his rights in his defense of the crime charged.

The judgment is affirmed.

STILES, ANDERS, HOYT and SCOTT, JJ., concur.

[No. 783. Decided July 11, 1893.]

COLUMBIA AND PUGET SOUND RAILROAD COMPANY, *Respondent*, v. A. CHILBERG, *Treasurer of the City of Seattle, Appellant*.

TAXATION—GROSS EARNINGS LAW—EXEMPTION OF RAILROAD PROPERTY—CONSTITUTIONAL LAW—ASSESSMENT BY MUNICIPAL CORPORATIONS.

The act of November 28, 1883, known as the "gross earnings law," which exempted railroad property from taxation and substituted a tax upon the gross earnings of the railroads, was not in conflict with § 1924 of the organic act, requiring all taxes to be equal and uniform, and that no distinction be made in the assessments between different kinds of property.

Under said act all the property of the railroads was exempted, whether actually used in the operation of the roads or not.

Where the charter of a city limited its right to impose taxes upon all property within the city to that "taxable for territorial and county purposes," the city had no right to impose taxes upon a railroad whose property was exempted by territorial law.

Appeal from Superior Court, King County.

George Donworth, and James B. Howe, for appellant.

Andrew F. Burleigh, for respondent.

The opinion of the court was delivered by

HOYT, J.—It is contended on the part of the appellant that the act of November 28, 1883, commonly known as

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the gross earnings law, was void, for the reason that it was in conflict with the organic law of the territory. The provision of the organic act, which it is claimed was violated in its enactment, was as follows:

“All taxes shall be equal and uniform, and no distinctions shall be made in the assessments between different kinds of property, but the assessments shall be according to the value of the property.”

If the legislation in question established a different rule of taxation as to any class of property from that by virtue of which taxes are imposed upon other classes, it was void by reason of such conflict. Such, however, is not the necessary construction of the act in question. A more reasonable interpretation thereof is, that it did not attempt to prescribe any rule of taxation. Under this provision in the organic act there can be no doubt of the right of the legislative assembly to exempt the property of any person or corporation. Such has been the holding of nearly or quite all of the courts of the different states, under constitutional provisions requiring assessments to be according to value as broad and full as the clause of the organic act above set out. It must, therefore, under the authorities, be held that, under said provision, it was within the power of the legislative assembly to have entirely exempted the property of all railroad corporations from taxation. And if this could be done without any consideration being received therefor, it certainly could be for what was deemed by the legislature a sufficient consideration. It must, therefore, be held that the act in question was not void by reason of its conflict with the provisions of the organic act.

It is further claimed on the part of the appellant that, if the law is valid, it did not exempt other property of the corporation than that actually used in its operation. We think, however, that the language used is so broad that it must be held to cover all of the property of the corpora-

tions entitled to the benefits of the act. The cases cited by appellant upon this branch of the case would be decisive of the question, if the language used by the legislature had been such as to leave room for any interpretation thereof by the courts, but the language of the act is so broad and certain that, the power of the legislature once being conceded, there is no room for holding otherwise than that the act exempted all of such property.

The appellant further contends that, even although the act is valid, and that for that reason the property was not liable to assessment for territorial and county purposes, it should still be held that the exemption did not extend to taxes sought to be imposed by municipal corporations by virtue of the powers conferred upon them in their charters. If the charter of the city of Seattle had made use of the broad language cited in the brief of the appellant, without any qualification thereof, there would be much force in this contention, but in the charter of said city the broad language by which it is given the right to impose taxes upon all property, both real and personal, within the city, is limited by this pertinent clause, "which is by law taxable for territorial and county purposes," and when so limited it affords no foundation whatever for this contention of appellant. The city derived all its power to impose taxes upon any property by virtue of the express provision of its charter, and, when such express provision contained as a part thereof a clause which limited the property which might be so taxed to that which was by law taxable for territorial and county purposes, it follows that whenever any class of property was by law exempted from taxation for territorial and county purposes the city was, by the terms of its own charter, deprived of any power to impose taxes thereon. There is, therefore, no foundation for the application of the rule, that a general statute will not ordinarily affect or repeal a special statute, upon which the ap-

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pellant founded its argument upon this branch of the case. We feel compelled to hold that the law was valid; that it covered all the property of the corporation respondent, and that it exempted the same, not only from territorial and county taxes, but that by virtue of such exemption the city of Seattle was deprived of the right to impose any taxes thereon by the provisions of its own charter.

The judgment must be affirmed.

DUNBAR, C. J., and ANDERS, SCOTT and STILES, JJ.,
concur.

[No. 861. Decided July 11, 1893.]

WHITING MANUFACTURING COMPANY, *Appellant*, v. JAMES
M. GEPHART, *Receiver, Respondent*.

SALE — BILL OF SALE — RECORDING — RESCISSION.

Under § 1454, Gen. Stat., no sale of personal property is valid as against existing creditors or innocent purchasers, where the property is left in the possession of the vendor, unless such sale be evidenced by a memorandum in writing, and such memorandum be recorded in the auditor's office of the county in which the property is situated within ten days after such sale.

Where there has been an absolute delivery of goods under a contract of sale, thus resting title in the purchaser, and he has sold a portion of the goods, an agreement to return the remaining goods to the original owner does not amount to a rescission of the original contract of sale, but to a re-sale of the goods, and is void as to creditors, when there is no delivery of possession nor any bill of sale executed and recorded.

Appeal from Superior Court, King County.

Wiley & Bostwick, for appellant.

Frank A. Steele, for respondent.

The opinion of the court was delivered by

HOYT, J.—The only reasonable construction of § 1454, General Statutes, is that thereunder no sale of personal property is valid as against existing creditors or innocent purchasers, where the property is left in the possession of the vendor, unless such sale be evidenced by a memorandum in writing, and such memorandum be recorded in the auditor's office of the county in which the property is situated within ten days after such sale shall have been made. The construction of said section contended for by the appellant would lead to such results as to make it the duty of courts to avoid such construction, if the language used will allow them so to do. If the construction contended for by it be adopted, a sale not evidenced by a memorandum in writing would be good without any condition whatever, while one thus evidenced would only be good upon condition that the memorandum so evidencing the sale should be recorded as required by the statute. The language used, when taken in connection with the other provisions of the statute relating to the same subject, is not such as to lead us to believe that the legislature intended such a condition of things. The construction which we have above suggested does no violence to the language of the section, excepting that we construe the clause, "no bill of sale," as though it read "no sale," which we think it is necessary that we should do in order that the evident intent of the legislature should have force. Thus construing our statute, it is evident that if the transaction between the appellant and the one to whom it originally sold the goods in controversy is to be treated as a sale, it cannot have force as against the respondent as a representative of the creditors of such person. There was no bill of sale executed between the parties, nor was there any sufficient delivery by the seller to the purchaser.

Appellant contends, however, that the transaction should not be treated as a sale, but rather as a rescission of the contract of sale originally made by the appellant. In our opinion this position is not tenable. The contract of purchase had been entirely completed by an absolute delivery of the goods, and the title thereto had vested in the purchaser. Such being the case, his title could only be divested as to creditors and *bona fide* purchasers by the same formalities as were necessary to constitute an original sale. Besides, it appears reasonably certain from the record that the entire contract under which the goods had been originally bought could not be rescinded for the reason that some of such goods had been disposed of by the purchaser. There could, therefore, be no rescission unless the original transaction could be divided into as many separate contracts of purchase as there were articles purchased. This could not be done, as it is evident that a single contract of purchase covered all the goods embraced in an entire bill. And it could not be rescinded unless all of such goods were so situated that they could be returned to the seller in consideration of his release of the purchaser from the payment of the purchase price thereof.

As we gather the facts from the record in this case, a certain portion of the goods billed by the appellant to the purchaser had been sold by him, and the attempt to rescind only went to those remaining on hand. When we consider these facts, in connection with all the other circumstances surrounding the transaction, it seems clear to us that it was not a rescission of the former contract, but was, in fact, a re-sale of the goods to the original owner thereof. This re-sale might have been good as between the parties, but cannot have force so far as creditors are concerned. This was the view taken by the court below, and its judgment must be affirmed.

DUNBAR, C. J., and SCOTT, ANDERS and STILES, JJ., concur.

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[No. 868. Decided July 11, 1893.]

J. M. NICHOLS AND L. E. HANDLEY, *Appellants*, v. ALBERT OPPERMANN *et al.*, *Respondents*.

CONTRACT FOR CONVEYANCE OF LANDS—PAROL EVIDENCE.

Parol evidence is not admissible to show the terms and conditions upon which deeds for the exchange of lands had been left with a third person, when such deeds had not been delivered in escrow, and there was no written contract for the conveyance of the lands. (HOTT, J., dissents.)

Appeal from Superior Court, Pierce County.

Taylor & McKay, for appellants.

Doolittle & Fogg, and *John P. Cass*, for respondents.

The opinion of the court was delivered by

SCOTT, J.—Plaintiffs allege that they had entered into an agreement with certain of the defendants for an exchange of lands, and they brought this action to enforce a specific performance. Judgment was rendered for the defendants, and the plaintiffs appealed. Deeds had been prepared and signed by the respective parties, and deposited with John P. Cass, one of the defendants, who was the general legal adviser and attorney for the others. The complaint did not allege whether the contract was in writing or by parol. The answer of the defendants denied the allegations of the complaint, and by way of affirmative defense the answer of some of the defendants admitted that there had been negotiations between them and the plaintiffs looking to an exchange of lands, but denied that they had ever agreed upon the terms thereof. It was claimed that the deeds had been prepared as a matter of convenience and to avoid unnecessary delay in case said defendants should agree to such exchange after an inspection of the lands to be con-

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veyed to them by the plaintiffs. There were other conditions also connected with said negotiations, which it will be unnecessary to notice.

Appellants complain of certain rulings of the court preventing them from offering testimony to show the various talks and conversations of the parties prior to, but leading up to, the signing and deposit of the deeds. The general proposition is admitted that an oral contract to convey real estate cannot be enforced, but it is claimed by appellants that in this instance the defendants waived the point that the contract was not in writing by virtue of their pleadings. We are unable to agree with appellants' contention in this regard. The contract alleged was squarely denied in the answers, and in the affirmative matter set up it was not admitted that any contract had been made.

It is further contended by the appellants that the deeds were left with said John P. Cass to be delivered to the appellants upon the satisfaction of a mortgage by them upon the land to be conveyed to defendants, and that 'as the deeds were signed and deposited with a third person, parol proof might be made of the contract otherwise. The condition upon which a deed is delivered in escrow may rest in and be proved by parol. This is as far as the rule extends, and it presupposes a valid contract to convey.

Our statute, § 1422, Gen. Stat., reads:

"All conveyances of real estate, or of any interest therein, and all contracts creating or evidencing any encumbrance upon real estate, shall be by deed."

To constitute a deed there must be a delivery to the grantee personally or to some third person for him. A deposit of a deed with a third person to be delivered to the grantee upon the happening of some future *certain* event has been held sufficient to constitute the deed an escrow, and control of it in such a case has passed out of the grantor's hands. But where the happening of the event

is uncertain or where the grantor retains or reserves control over the instrument, it is not an escrow. Nor is such an undelivered deed evidence of a valid contract to convey, for it is essential that the writing required by the statute be delivered. Where there exists a previous valid contract to convey, the conditions upon which the deed is deposited may rest in and be proved by parol.

In the case of *Thayer v. Luce*, 22 Ohio St. 62, where the deed was retained by the grantor, the terms upon which it was to be delivered were evidenced by a contract in writing which was delivered, which, however, was not full and explicit, and the deed was resorted to for the purpose of aiding it.

In the case at bar there was no written contract to convey the lands, nor had possession thereof been transferred so as to constitute a part performance of a parol contract to render it valid. Even if a case could be found sustaining the plaintiff's contention here—which we very much doubt—it is evident that the overwhelming weight of authority is against it, and the evidence offered of the various talks between the parties to prove the contract alleged was incompetent for such purpose, and was properly excluded. *Bonham v. Craig*, 80 N. C. 224; *Campbell v. Thomas*, 42 Wis. 437; *Popp v. Swanke*, 68 Wis. 364 (21 N. W. Rep. 916); *Fitch v. Bunch*, 30 Cal. 209; *Wier v. Batdorf*, 24 Neb. 83 (38 N. W. Rep. 22).

Judgment affirmed.

DUNBAR, C. J., and ANDERS and STILES, JJ., concur.

HOYT, J.—I dissent. I think the negotiations between the parties should have been allowed to be shown as tending to explain the conditions upon which the deeds were to be delivered.

[No. 895. Decided July 11, 1898.]

EDWARD WELLS *et al.*, *Respondents*, v. THE COLUMBIA
NATIONAL BANK OF NEW WHATCOM, *Appellant*.ATTACHMENT—LABOR CLAIM NOTICES—EFFECT OF DISMISSAL OF
ACTION.

Where an action of attachment has been commenced and certain property levied upon, but before judgment the action has been dismissed by the plaintiff, and a chattel mortgage on the same property taken from defendant by plaintiff and subsequently foreclosed, the fact that certain parties served labor claim notices, under § 8124, Gen. Stat., in the original action, will not give them a cause of action against the mortgagee.

Appeal from Superior Court, Whatcom County.

Black & Leaming, for appellant.

I. N. Maxwell, for respondents.

The opinion of the court was delivered by

SCOTT, J.—Appellant commenced a suit against one Foster and caused a writ of attachment to be issued therein against his property, under which the sheriff seized certain of his chattels. The respondents here then served labor claim notices under § 8124, Gen. Stat. Subsequently, and before judgment, appellant dismissed said action, and the property attached was released by the sheriff and delivered to Foster. Whereupon Foster executed a chattel mortgage upon said property to appellant. The mortgage was subsequently foreclosed and the proceeds arising from the sale of the property were applied upon the mortgage debt, but were insufficient to satisfy it. Respondents brought this action against appellant to recover the amount of their several labor claims, and obtaining judgment therefor an appeal was taken.

In our opinion there was no foundation for such an ac-

tion. The service of the notice provided for by the statute aforesaid does not create a lien upon the property nor make the plaintiff in the action responsible for the amount of such labor claims. Said statute provides that such claims shall be first paid out of the proceeds of the property when sold. No obligation rests upon the plaintiff in such action to prosecute the same to a judgment and a sale of the property seized, even though the result of a failure to do so may be to prevent the claimants under the notices from collecting their claims therein. The statute seems to be inefficient and defective for the purpose of creating and preserving a lien unless the property is actually sold. However, as to whether the court could upon an application therefor have taken any steps to preserve and enforce such claims in said original suit, we are not called upon to decide, for it was not asked to take any. This case is brought upon the theory that it was incumbent on the plaintiff to proceed with such suit after the service of the notices, which is not well founded. No fraud is charged against appellant in any way, but a legal liability is urged as resting upon it to pay such labor claims under the facts stated.

Reversed.

DUNBAR, C. J., and HOYT, ANDERS and STILES, JJ.,
concur.

May, 1898.] Opinion of the Court—DUNBAR, C. J.

[No. 808. Decided May 24, 1898.]

STEPHEN REIDT, *Respondent*, v. THE SPOKANE FALLS & NORTHERN RAILWAY COMPANY, *Appellant*.

[No. 807. Decided May 24, 1898.]

JACOB FLEUTSCH, *Respondent*, v. THE SPOKANE FALLS & NORTHERN RAILWAY COMPANY, *Appellant*.*Appeals from Superior Court, Spokane County.**McBride & Allen*, for appellant.*Ridpath & Marshall*, for respondent.

Per Curiam.—The facts in these two cases being nearly the same as those in the case of *Enoch v. Spokane Falls, etc., Ry. Co.*, *ante*, p. 393, and the legal questions involved being identical, it was stipulated by counsel for the respective parties that the three causes should be heard together, and that the disposition of the cases should be governed by the decision in that case, in which alone briefs were filed.

For the reasons given in the opinion filed in that case, the judgment of the lower court in each of these cases is affirmed.

[No. 929. Decided May 25, 1898.]

STATE OF WASHINGTON, *Respondent*, v. JAMES D. MINKLER, U. A. GILE, *et al.*, *Appellants*.*Appeal from Superior Court, Lewis County.*

Opinion on application for reduction of bail of U. A. Gile.

Swasey & Lemley, and *O. V. Linn*, for appellants.*A. E. Rice*, for respondent.

DUNBAR, C. J.—Defendant U. A. Gile was found guilty of manslaughter, and his appeal bond was fixed by the trial court in the sum of six thousand dollars. This amount he claims is excessive and unjust, and moves this court to reduce the same. Counsel for defendant have not cited the court to any law empowering this court in a proceeding of this kind to exercise the power of reducing

the amount fixed by the trial court. Hence, without further investigation, we assume that no such authority exists under the law, and the motion is therefore denied.

STILES, SCOTT, HOYT and ANDERS, JJ., concur.

[No. 699. Filed November 6, 1893.]

HUTTIG BROTHERS MFG. CO. *et al.*, v. DENNY HOTEL CO. *et al.*

Dissenting Opinion.

(For opinion of court see *ante*, p. 122.)

DUNBAR, C. J.—I dissent. I think the only theory upon which the constitutionality of the lien law can be sustained is the theory of the benefit to the property upon which the work is done or material furnished; and this material never having been put into the building, the building should not respond to a lien for its value. It makes no difference to my mind why the material was not used in the house; whether on account of the contractor having suspended work or for any other reason. The *fact* is it was *not* used, and this is the fact in which the owner is interested.

I think in all things the judgment should be affirmed.

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- notice for a period of two months without filing will justify the dismissal of the appeal upon motion by the respondent, based upon a short record.—*In re Eyres' Estate*..... 132
11. *Costs—Expense of Brief.* The cost of that portion of a brief which is devoted exclusively to a recital of the testimony given on the trial of a cause, cannot be recovered by the successful party as among the costs of appeal.—*Bellingham Bay Land Co. v. Dibble*..... 165
12. *Jurisdictional Amount.* An appeal will not lie from a judgment where the original amount in controversy is less than \$200, and does not involve the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute, although the action may be for the recovery of a portion of a stipulated price under a contract which, in the aggregate, exceeds \$200 in amount.—*Lotz v. Mason Co*..... 166
13. *Settlement of Statement Before Judgment—Effect.* Where the transcript on appeal in an equity cause shows that the statement of facts was settled before the rendition of judgment, a motion to strike the statement will be granted, on the ground that there is no affirmative showing that all the facts necessary to the complete determination of the cause are before the supreme court.—*Bartlett v. Reichenecker*..... 168
14. *Objections Not Raised Below.* The fact that a petition to vacate a judgment had been filed in a cause subsequent to the denial of a motion to vacate the judgment on the same grounds, cannot be urged for the first time on appeal.—*Bast v. Hysom*..... 170
15. *Same.* The fact that the testimony upon which the argument of counsel was based was incompetent cannot be raised for the first time in the supreme court, but the testimony should have been objected to when offered.—*Sears v. Seattle, etc., St. Ry. Co*..... 227
16. *Appealable Order—Order Vacating Judgment.* An order setting aside a judgment is not a final order from which an appeal will lie.—*Greene v. Williams*..... 260
17. *Failure to File Transcript—Negligence of Clerk.* The omission of the clerk to send up the statement of facts with the transcript of the record is not ground for dismissal of the appeal, where the mistake is corrected as soon as discovered.—*Fox v. Utter*..... 299
18. *Appealable Order—Appointment of Assignee by Court—Mundamus.* An appeal will not lie from an order of the su-

APPEAL—CONTINUED.

- perior court appointing an assignee in place of the one appointed by the assignor in his deed of assignment for the benefit of creditors; and, under such circumstances, the superior court cannot be compelled by *mandamus* to fix the amount of the *supersedeas* bond for an appeal from such order.—*State, ex rel. Volaw, v. Parker*..... 411
19. *Settlement of Statement—Disqualification of Judge.* Where the judge of the superior court who tried a case has ceased to hold office, an appellant should give notice of the settlement of a statement of facts before the superior court of the county in which the case was tried, and if, when the matter comes on to be heard, it is ascertained that the judge of said court is disqualified from acting in the matter, it should be continued until a judge qualified to act is present.—*Watt v. O'Brien*..... 415
20. *Dismissal of Action by Supreme Court.* Where, under all the evidence, it appears that the defendant was entitled to have the jury instructed to find a verdict in his favor, the supreme court will, on reversal of the judgment on appeal, direct a dismissal of the action.—*Bernhard v. Reeves*..... 424
21. *Question Not Raised Below.* The fact that such order operated as an assignment of the account cannot be raised for the first time on appeal.—*Patchen v. Parke & Lacy Machinery Co*..... 486
22. *Weight of Testimony.* Where there is evidence in an action tending to support the issues made, the supreme court will not pass upon the weight of the testimony.—*Booth v. Columbia, etc., R. R. Co*..... 531
23. *Omission of Judge to Sign Bill of Exceptions—When Appellant Not Prejudiced.* Where an appellant has filed his bill of exceptions with the judge and served the respondent with a copy within the prescribed time, to which the respondent has filed objections and suggested certain amendments, the fact that the judge does not settle and sign the bill at the designated time, but subsequently, after a considerable length of absence from the state, settles and signs the bill of exceptions without notice to the respondent, but embodying the amendments proposed by the latter, is not sufficient ground for striking the bill from the transcript.—*State v. Payne*..... 563

See INSANITY, 2; JUDGMENT, 3, 5, 6, 8; PROHIBITION.

ARSON.

1. *Character of Premises—Description in Information.* An information which charges defendant with the crime of arson in setting fire to "a two-story wooden storehouse building," is sufficiently definite in description, although the lower story only of the building was used as a storehouse, and the upper story as a lodging house.— *State v. Biles* 186
2. *Ownership and Possession of Premises.* Where the actual or constructive possession of a building is in a person who is alleged in an information for arson to be the owner, it is no variance if it be proved on the trial that he was in such possession at the time of the offense, although the actual ownership may be shown to be in another.— *Id.* 186

ASSIGNMENT FOR BENEFIT OF CREDITORS.

- Assignment by Operation of Law.* The fact that a debtor in failing circumstances disposes of his entire property to one creditor does not work an assignment thereof, by operation of law, for the benefit of creditors.— *Furth v. Snell* 542
- See APPEAL, 18; FRAUDULENT CONVEYANCES, 9, 10; INSOLVENCY.

ASSUMPSIT.

- Money Had and Received—Breach of Contract.* An action for money had and received cannot be maintained for the breach of a contract, although such contract was invalid for the reason that it was a lease of community lands executed by the husband alone.— *Dietz v. Winehill* 109

ATTACHMENT.

1. *Wrongful Levy—Action on Bond.* In an action upon a bond for wrongful attachment of property of the obligees, recovery may be had in one suit for damages to both the joint and individual property of the obligees.— *Sloan v. Langert* 26
2. *Same—Exemplary Damages.* Under § 295, Code Proc., exemplary damages may be recovered for malicious attachment. (*Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, distinguished.)— *Id.* 26
3. *Same—Evidence—Rebutting Presumption of Malice.* In order to rebut the presumption of malice in suing out a wrongful attachment, the defendant may testify that he believed the matters stated in the attachment affidavit to be true at the time of the issuance of the writ; and that he laid

ATTACHMENT—CONTINUED.

- the matter fully before his counsel and acted upon the latter's advice.—*Id.*..... 26
4. *Same—Evidence.* The fact that an attachment was dissolved is merely *prima facie* evidence that it was rightfully dissolved, and does not preclude an investigation of that question in an action on the bond.—*Id.*..... 26
5. *Refusal to Dissolve Attachment—Harmless Error.* Error of the court in overruling a motion to dissolve an attachment, and in continuing by judgment the lien upon the goods attached, is harmless where the judgment in the main action is conceded to be right, and the goods attached would have been subject to execution upon such judgment.—*Turpin v. Whitney*..... 61
6. *Action on Bond—Liability of Sureties—Necessity of Prior Demand on Principal.* Sureties upon an attachment bond may be liable for damages, without prior demand upon the principal, or suit against him to adjudicate the damages.—*Seattle Crockery Co. v. Haley*..... 302
7. *Same—Reasonable Cause—Damages.* In order for the sureties upon an attachment bond to avoid liability for actual damages, reasonable cause for the attachment must exist as a fact; credible information of facts sufficient to warrant a belief in the existence of reasonable cause tends merely to disprove malice and thereby relieve from exemplary damages.—*Id.*..... 302
8. *Same.* In an action upon an attachment bond for damages for wrongful levy the plaintiff may show want of reasonable cause for the levy by proof as to the conduct of his affairs and the good faith of his transactions.—*Id.*..... 302
9. *Same—Liability of Principal for his Agent's Malice.* Liability upon a bond for malicious attachment accrues, if the agent whose direct act caused it to be issued was actuated by malicious motives, although without the knowledge of the principal, unless it is shown that the agent had no authority to attach, and that his act in doing so was affirmatively repudiated as soon as known by his principal.—*Id.*... 302
10. *Same—Damages—Injury to Commercial Credit.* In an action for damages for malicious attachment, injury to commercial credit is not an element of damages.—*Id.*..... 302
11. *Labor Claim Notices—Effect of Dismissal of Attachment.* Where an action of attachment has been commenced and certain property levied upon, but before judgment the

ATTACHMENT—CONTINUED.

action has been dismissed by the plaintiff, and a chattel mortgage on the same property taken from defendant by plaintiff and subsequently foreclosed, the fact that certain parties served labor claim notices, under § 8124, Gen. Stat., in the original action, will not give them a cause of action against the mortgagee.—*Wells v. Columbia National Bank* . 621

See CHATTEL MORTGAGES, 5; COURTS, 2; EXEMPTIONS.

BANKS AND BANKING.

1. *Taxation—National Bank Shares.* The assessment of the capital stock of a national bank, made to the bank *in solido*, is valid.—*First National Bank v. Chehalis Co.* 64
2. *Same—Injunction.* The collection of the tax assessed upon the capital stock of a national bank will not be enjoined on the ground that the moneyed capital of such institutions is unjustly discriminated against, when the complaint does not show that, either by reason of the law or through the action of the assessors, some considerable moneyed capital, which is employed by individuals in the business of making profit by the use of their moneyed capital as money, is permitted to escape taxation. The non-taxation of "credits" is not ground for such injunction.—*Id.* 64
3. *Discounting Promissory Note—Notice of Fraud.* A remark by the maker of a promissory note to the president of a bank that the note was procured by fraud and that he would not pay it, does not bind such bank, although it subsequently discounts the note, when such communication was not made to the president in his official capacity, and was not made at the bank nor with reference to the bank's business.—*Washington National Bank v. Pierce*..... 491
4. *Same—Evidence of Custom.* In an action by a bank upon a promissory note payable one year after date, and which had been discounted by the bank a month before maturity, it is not error for the court to sustain an objection to the question, "Is it customary in that business to discount paper that has run nearly the entire time, long time paper like this, without some inquiry?"—*Id.* 491

See INTEREST.

BONDS.

Action on Bond—Pleading. In an action against the sureties upon an attachment bond, the complaint does not state facts sufficient when it alleges the execution of the bond

BONDS—CONTINUED.

by the principals, without alleging that the sureties joined in its execution, although it may set out a copy thereof in the complaint, to which the names of the sureties are appended.—*Seattle Crockery Co. v. Haley*..... 302

BOUNDARIES.

Location of Line Between Quarter Sections. The patentee from the government, of the northeast quarter of a certain section, which was described as containing 160 acres of land, made conveyances thereof as follows: To one grantee, a tract commencing 20 rods south of the northeast corner of the northwest quarter of the northeast quarter of said section, thence 8 rods west, thence 20 rods south, thence 8 rods east, thence 20 rods north to the beginning; to another grantee, a tract commencing at the northwest corner of the northeast quarter of the northeast quarter of said section, thence south 40 rods, thence east 20 rods, thence north 40 rods, thence west 20 rods to the beginning. Both grantees claimed a strip of land averaging eighteen feet in width. In an action by one for possession of said strip of land it was shown that none of the lines of said quarter section were one-half mile in length. *Held*, That the starting point for the survey of the two tracts in controversy should be the exact middle of the line between the northeast corner of the section and the half-mile post set by the government surveyors, and that a line run south from that point would establish the boundary between the two tracts.—*Packscher v. Fuller*..... 534

BURGLARY.

1. *Sufficiency of Information—Description of Premises.* An information for grand larceny which charges the breaking and entry of an office, is sufficient under Penal Code, §46, without also charging that such office was a place where goods, merchandise or valuable things were kept for sale or deposit.—*State v. Sufferin*..... 107
2. *Same—Intent.* An information sufficiently alleges burglarious entry with intent to commit a felony when it charges intent to commit grand larceny, followed by a statement of the acts intended, which, if carried into effect, would have constituted such offense.—*Id*..... 107

CARRIERS.

1. *Degree of Care Necessary in Operating Electric Cars.* An instruction is not erroneous which charges a jury that a de-

CARRIERS—CONTINUED.

- endant is bound to exercise the highest degree of care, prudence and caution in the running and operating of its cars so as to prevent injury to its passengers, as such instruction means simply the highest degree of practicable care and prudence in conducting that particular business.—*Sears v. Seattle, etc., St. Ry. Co.* 227
2. *Same—Control of Car—Negligence of Third Parties.* Where a motorman operating a car sees that the driver of a wagon in front of him on the track does not look back, nor pay any attention to the ringing of the bell, nor increase his rate of speed, nor attempt to leave the track, it is the duty of the motorman to bring his car under control, and, if necessary to avoid a collision, to stop his car; and the negligence of the driver on the wagon, in contributing to the injury received by a passenger on the car, affords no defense to the carrier.—*Id.* 227

CERTIORARI.

1. *When Lies—Granting New Trial.* *Certiorari* will not lie to review the action of the superior court in granting a new trial.—*State, ex rel. Tibbals, v. Superior Court.*..... 201
2. *Same—Amount in Controversy.* The jurisdiction of the supreme court to inquire into the proceedings of the superior court under a writ of *certiorari*, is not dependent upon the amount in controversy; but the writ will lie whenever judgment is rendered by the superior court without proper service of summons.—*State, ex rel. Boyd, v. Superior Court,* 352
3. *Quashing Writ.* Although a writ of *certiorari* has been granted in favor of plaintiff, it may, before compliance with its directions, be quashed on motion of defendants therefor.—*Spooner v. Seattle.*..... 370
4. *Application Should be Within Reasonable Time.* While the statute does not fix the time within which a writ of *certiorari* should be applied for, it should be applied for within a reasonable time after the act complained of has been done, and two years is not a reasonable time.—*Id.*..... 370
5. *Review of Street Assessment Proceedings.* Where the only method prescribed by a city charter for the collection of a street assessment is by foreclosure in a court of record, *certiorari* will not lie for the purpose of reviewing the assessment proceedings.—*Id.*..... 370

CHATTEL MORTGAGES.

1. *Levy Upon Mortgaged Chattels—When Mortgagee Cannot Claim.* The holder of a chattel mortgage, who has not re-

CHATTEL MORTGAGES—CONTINUED.

- duced the property to his possession, cannot maintain a proceeding as owner to recover possession thereof, when it has been levied upon as the property of another.—*Sayward v. Nunan*..... 87
2. *When Instrument Construed as Chattel Mortgage.* Where the proof creates a doubt as to whether an instrument effects a conditional sale of property or is a chattel mortgage thereof, the instrument should be treated as a chattel mortgage.—*Id*..... 87
3. *Sale by Holder of one Note—What Title Passes.* Where one chattel mortgage is given to secure three promissory notes to different parties, and the holder of one of the notes, under the power of sale contained in the mortgage, has the entire property sold without the holders of the other notes being made parties thereto, the entire title to the property passes to the purchaser, and all the mortgagees are entitled to share *pro rata* in the proceeds of the sale.—*First National Bank v. Woolery*..... 215
4. *Same—Distribution of Proceeds.* The fact that the property was purchased at the foreclosure sale in the interest of the note holders who had no part in instituting the proceeding, does not estop them from maintaining an action to secure a *pro rata* distribution of the fund arising from such sale.—*Id*..... 215
5. *Possession of Mortgagee—Attachment by Other Creditors—Priorities.* Where a chattel mortgage on a stock of goods is given to a *bona fide* creditor, who immediately takes possession, and, placing an agent in charge thereof, proceeds to the county seat to file the mortgage for record, the levy of an attachment, subsequent to the execution of the mortgage, but prior to its filing for record, will not give the attaching creditor any prior rights, although he may have had no notice of the mortgage until the sheriff was notified at the time of making the levy.—*First National Bank v. Carter*, 494

See TROVER AND CONVERSION.

COMMUNITY PROPERTY. See EXECUTORS AND ADMINISTRATORS, 1, 2; FRAUDULENT CONVEYANCES, 1; HUSBAND AND WIFE, 1-8.

CONSTITUTIONAL LAW.

Judicial Comment on Facts. An incidental allusion by the court to the facts in a cause, in determining a motion for a

CONSTITUTIONAL LAW—CONTINUED.

non-suit, is not a violation of §16, art. 4, of the constitution, prohibiting a judge from commenting on the facts.—*Patchen v. Parke & Lacy Machinery Co.*..... 486

See EMINENT DOMAIN, 3, 5; MUNICIPAL CORPORATIONS, 8, 9, 14, 18; OFFICE AND OFFICER, 1; SCHOOLS AND SCHOOL DISTRICTS, 2; TAXATION, 1.

CONTINUANCE.

Absence of Witness. A party to an action cannot be forced to trial the instant the cause is at issue, but is entitled to a continuance, upon a proper showing that the principal witness is absent from the state.—*Robertson v. Woolley*..... 156

CONTRACTS.

1. *Promise to Forbear Suit—Consideration.* An accepted order upon a third person for the payment of a debt not due is sufficient consideration for an agreement to forbear to sue upon a note which is past due.—*Staver & Walker v. Missimer*..... 173
2. *Same—May be Pleaded in Bar.* A promise to forbear to sue for a definite time, where the promise is based upon a sufficient consideration, may be pleaded in bar to an action.—*Id* 173

See DAMAGES, 2.

CORPORATIONS.

1. *Foreign Corporations—Filing Lien Notices Prior to Filing Articles—Effect.* The filing of articles of incorporation by a foreign corporation and the appointment of an agent after the filing of a lien notice, but before suit to foreclose same, is a sufficient compliance with the law relating to foreign corporations doing business within the state.—*Huttig Bros. Mfg. Co. v. Denny Hotel Co.*..... 122
2. *Capital Stock—Liability of Subscribers.* A corporation in this state cannot enforce subscriptions to its stock until the full capital stock has been subscribed for.—*Denny Hotel Co. v. Schram*..... 184
3. *Same—Subscriptions by other Corporations.* Under the laws of this state one corporation cannot subscribe to the capital stock of another corporation.—*Id* 184
4. *Actions to Recover on Stock Subscriptions—Effect of Part Payment.* A subscriber to the stock of a corporation does not waive any right to object to the validity of other sub-

CORPORATIONS—CONTINUED.

- scriptions, or to dispute the authority of the corporation to sue, merely from the fact that he has made payment on such subscription, when he has no knowledge as to the validity and *bona fides* of other subscriptions.—*Denny Hotel Co. v. Gilmore* 152
5. *Plea of Ultra Vires—When Unavailable.* Where a banking corporation has received and retained the benefits of a transaction it cannot set up the plea that the contract was *ultra vires*.—*Tootle v. First National Bank* 181
6. *Corporate Acts—Estoppel to Deny.* Although a contract of a corporation may not have been properly authorized by its board of trustees, yet, where the corporation continues to receive the benefits accruing from such contract, it is estopped to deny the validity thereof.—*Leslie v. Wilshire* ... 283
7. *Denial of Corporate Existence—Estoppel.* The principal and sureties giving bond for the attachment of property of a corporation are thereby estopped to deny its corporate existence.—*Seattle Crockery Co. v. Haley*..... 302
8. *Evidence of Corporate Existence.* The fact that plaintiff is a corporation may be *prima facie* established by parol proof that it is carrying on a general banking business as a national bank under the name by which it has brought suit, as judicial notice will be taken by the court of the general laws of the United States which authorize national banks.—*Yakima National Bank v. Knipe* 348
9. *Appointment of Manager—Authorization of Corporate Acts—Presumption.* When a corporation names some person as its manager, and as such allows him in a large measure to control all its business transactions, it must be held responsible for the acts of such manager in the name of the corporation, until it has been affirmatively shown that such acts were unauthorized.—*Carrigan v. Improvement Co* 590
10. *Unauthorized Acts—Estoppel.* In an action upon a note of a corporation signed in its name by its president and secretary, but for which there was no express authorization of the company, the company is estopped from asserting that the officers acted outside of their authority, when all the business of the company, including the making of numerous notes of the kind in question, had been for a long time transacted by said officers, and informally ratified by the company by its action in paying the same, no fault ever being found with the action of such officers in so conducting the business.—*Duggan v. Pacific Room Co* 593

CORPORATIONS—CONTINUED.

11. *Transfer and Pledge of Stock—Want of Record—Effect of Judicial Sale Against Stockholder.* The transfer by a stockholder of his shares of stock in a corporation, although no registration has been made thereof on the books of the corporation, will pass the title thereto to the transferee as against a subsequent purchaser on execution sale against the transferer.—*National Bank v. Gas and Fuel Co.*..... 597
12. *Same.* Under §2432, Code 1881, the interest of a pledgee in shares of stock in a corporation cannot be divested by judicial sale against the owner thereof, although such shares have not been transferred to the pledgee on the books of the corporation.—*Id.*..... 597

See FRAUDULENT CONVEYANCES, 8; GARNISHMENT;
MECHANICS' LIENS, 3.

COSTS.

1. *Witness Fees—Attendance Without Service of Subpœna.* A witness who attends a trial and testifies upon request, without the service of a subpœna upon him, is entitled to compensation.—*Christensen v. Union Trunk Line.*..... 75
2. *Dismissal of Action—Judgment for Attorney Fees.* A judgment against plaintiff, on the dismissal of his action in ejectment, for \$125 attorney fees, on the ground that plaintiff knew at the time of instituting suit that certain of the defendants were infant children for whom it would be necessary for the court to appoint a guardian *ad litem*, is erroneous.—*Mason v. McLean.*..... 81
3. *Attorney Fees—When Evidence Unnecessary.* Where the amount of attorney's fee in an action for the foreclosure of logger's liens is left to the discretion and decision of the court, a judgment therefor will not be disturbed, although no testimony may have been offered as to the reasonable value of such services.—*Proulx v. Stetson & Post Mill Co.*..... 478
4. *When Incident to Judgment.* Where, in an action for the recovery by an assignee of the proceeds of certain goods converted into money, judgment is given for the assignee, he is entitled, as an incident to the judgment awarding him possession of such money, to a judgment also for his costs.—*Mansfield v. First National Bank.*..... 603

See APPEAL, 6, 11; MECHANICS' LIENS, 5.

COUNTIES. See EMINENT DOMAIN, 3, 6.

COURTS.

1. *Transfer of Jurisdiction From Territorial to State Courts.*
Under the provisions of the enabling act and constitution of this state, which operated to transfer causes pending in the supreme court of the Territory of Washington to the supreme court of the State of Washington, the state supreme court acquired all the powers of the territorial court under the statutes of the territory, to remand criminal cases to the successors of the territorial district courts for the execution of its judgments.—*Way v. Woolery*..... 157
2. *Jurisdiction—When Neglect of Officer Does not Affect.* The failure of the sheriff to file with the clerk of the superior court the affidavit and bond delivered to him by a third person, who claims property seized by him under an attachment, will not deprive the court of the county in which the property was seized of jurisdiction to adjudicate the title to the property.—*State, ex rel. Peterson, v. Superior Court* 417
3. *Supreme Court—Mandamus as to State Officers—Regent of Agricultural College.* A member of the board of regents of the agricultural college is not a state officer over whom the supreme court has original jurisdiction in *mandamus* proceedings, within the meaning of §4, art. 4, of the constitution.—*State, ex rel. Stearns, v. Smith*..... 496

COVENANTS.

1. *Conveyances—Warranty—Covenant For Quiet Enjoyment.*
Where a grantor, instead of simply using the word "warrant" in a conveyance and leaving the statute to define what should be implied thereby, goes farther and sets out the particular thing or things which he will warrant against, he cannot be held to have intended other covenants than the one or ones thus set out.—*Leddy v. Enos*..... 247
2. *Same—Payment by Grantee of Delinquent Taxes.* The payment by the grantee of taxes which were a lien upon the land at the time of the conveyance, is not a breach of a covenant for quiet enjoyment, when there is nothing to show that anything is being done by the city or county that will in any manner endanger the title of the grantee.—*Id.* 247
3. *Seizin of Grantor—Breach of Covenant—After Acquired Title—Right of Action by Grantee.* Where the grantor of land is neither in possession nor has any right of possession at the date of his deed, the covenant of seizin confers upon the grantee an immediate right of action for the re-

COVENANTS — CONTINUED.

covery of purchase money paid, and the action cannot be defeated by the grantor's acquiring title subsequent to the commencement of the action.— *Rombough v. Koons*..... 558

CRIMINAL LAW.

1. *Commitment*. A commitment directed to the Sheriff of King county in the State of Washington, which directs him to commit a defendant to the county jail in the county of King and Territory of Washington, is sufficient to authorize the detention of the prisoner.— *Way v. Woolery*..... 157
2. *Evidence—Irrelevancy of Former Confinement in Jail*. Proof that a defendant in a criminal prosecution has formerly been confined in the county jail is irrelevant.— *State v. Payne*..... 563
3. *Same—Proof of Former Conviction*. The only competent evidence of the former conviction of defendant in a criminal prosecution is the production of a judgment of a court of competent jurisdiction founded upon an indictment or other proper accusation.— *Id*..... 563
4. *Same—Larceny—Admission of Knowledge of Crime*. An admission by defendant that he knew a certain larceny had been committed, was not evidence that he actually participated in the commission of the crime, and he could not be convicted on such an admission as a principal and active participant in the larceny.— *Id*..... 563
5. *Evidence—Variance*. In such a case, where the information alleges that the warrant was issued by a justice of the peace for a certain precinct and county for the arrest of defendant, the fact that in the warrant offered in evidence there were other names mentioned in addition to defendant's, does not constitute a prejudicial variance.— *State v. Brown*..... 609

See ARSON; BURGLARY; COURTS, 1; INDICTMENT AND INFORMATION; LARCENY; MUNICIPAL CORPORATIONS, 20.

DAMAGES.

1. *Personal Injuries—Negligence of Carrier*. A verdict for \$15,000 is not excessive in an action for injuries due to defendant's negligence, when the evidence shows that plaintiff, at the time of the accident, was a strong, healthy woman, of the age of thirty years; that she was industrious, and had been making fifty dollars per month, in addition to looking after household duties; that she has lost the

DAMAGES—CONTINUED.

use of her lower limbs by reason of paralysis, as a result of her injuries, and that she will be a helpless invalid during the remainder of her life.—*Sears v. Seattle, etc., St. Ry. Co* 227

2. *Breach of Contract to Pay Cash.* Where there is a breach of a contract to pay cash when due for certain work, the only damages recoverable, when the injured party proceeds with the work to completion, is interest on the money from the time of the default.—*Arnott v. Spokane* 442

See ATTACHMENT, 1, 2, 7, 8, 10; EMINENT DOMAIN, 1-3, 5, 6; PLEADING, 1.

ELECTIONS AND VOTERS.

Submission of Water Works Purchase—Registration of Voters. There is no state law requiring registration of voters at elections to decide upon propositions for purchasing water works and light plants, and bonding the city to pay therefor.—*Seymour v. Tacoma* 138

See MUNICIPAL CORPORATIONS, 2, 3, 26, 27.

EMINENT DOMAIN.

1. *Action for Damages—Pleading.* In an action against a railroad company for damages caused by raising the grade of a street five feet, thereby shutting off access thereto from abutting property, an answer alleging that the right to enter upon the street and change the grade thereof was authorized by an ordinance of the city is demurrable for want of sufficient facts, when the charter of the city, while authorizing the grant of franchises to lay railway tracks, provides that "no railway track can thus be laid down until the injury to property abutting upon the street . . . has been ascertained and compensated."—*Hatch v. Tacoma, Olympia, etc., R. R. Co* 1
2. *Same—Liability of City for Construction of Railroad in Street.* Where a city enacts an ordinance, under its charter, granting the privilege to a railroad company to tunnel a street, build a bridge over it, and lay a railroad track therein, the city is not liable therefor, and the dismissal of the action against the railroad company for plaintiff's failure to make the city a party defendant is error.—*Id.* 1
3. *County Roads—Appropriation of Land for—Damages—Constitutional Law.* Under art. 1, §16 of the constitution, private lands cannot be appropriated by a county for road

EMINENT DOMAIN—CONTINUED.

purposes, unless the amount of damages is ascertained in court, in a proceeding instituted for that purpose; and so much of the act of March 7, 1890, relating to county roads, as conflicts therewith is unconstitutional.—*Peterson v. Smith*..... 163

4. *Appropriation of Public Lands—Rights of Pre-emption Claimant.* The rights of a preemption claimant to public land of the United States are reserved by certain provisions of the act of congress of March 3, 1875, entitled "An act granting to railroads a right-of-way through the public lands of the United States;" and where a railroad appropriates public lands upon which a preemption entry has been properly made prior to the filing of a profile of the road in the office of the secretary of the interior, the railroad is liable for damages.—*Enoch v. Spokane Falls, etc., Ry. Co*..... 393

5. *Same—Measure of Damages.* Under the provisions of art. 1, § 16 of the constitution, the measure of damages, where land is appropriated by a railroad for right-of-way purposes, is the fair market value of the land taken at the time of the appropriation, together with the amount of depreciation, if any, in the value of the land not taken, and these respective amounts should be ascertained without regard to any benefits that may have resulted from the construction, or proposed construction, of the railroad. (*Northern, etc., R. R. Co. v. Coleman*, 3 Wash. 234, overruled.)—*Id*..... 393

6. *Appropriation of County Road—Action by County for Damages—Pleading.* In an action against a railroad company, under § 1570, Gen. Stat., to recover the cost of relocating and opening a portion of a county road alleged to have been appropriated by the company, the complaint fails to state a cause of action, when its only allegation of damage is "that the expense of relocating and opening that portion of the road so destroyed and appropriated by defendant as aforesaid is and will be the sum of thirty thousand dollars."—*Weymouth v. Pt. Townsend, etc., R. R. Co*..... 575

EQUITY. See ACTION; APPEAL, 5; HUSBAND AND WIFE, 3; MECHANICS' LIENS, 6, 7.

ESTOPPEL.

1. *When Mortgagee Not Estopped to Dispute Liens.* The fact that a mortgagee loaning money for the erection of a building on certain land reserves the right in the mortgage to

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ESTOPPEL—CONTINUED.

pay liens that may be created against the property from the amount of the mortgage loan, does not make the mortgagee a party to such liens or estop him from disputing the claims of lienors.—*Huttig Bros. Mfg. Co. v. Denny Hotel Co.* 122

2. *Pleading.* In an action by certain parties for the price of oats sold defendant, an answer by defendant that the plaintiffs sold him the oats not as individuals but in their corporate capacity as officers and stockholders of a mill company, and that he purchased the oats for more than the market price for the reason that said mill company was indebted to him, is not sufficient as a plea of estoppel, as it does not aver that defendant was induced to believe that the mill company was the owner of the oats by any statement, representation or act on the part of plaintiffs.—*Walker v. Baxter* 244

8. *Same.* The facts constituting an estoppel must be specially pleaded in order to be available as a defense.—*Id.*..... 244

See CHATTEL MORTGAGES, 4; CORPORATIONS, 6, 7, 10; EXECUTORS AND ADMINISTRATORS, 2; HUSBAND AND WIFE, 1, 4; MUNICIPAL CORPORATIONS, 21, 22, 32, 34; PARTIES, 3; PLEADING, 3.

EVIDENCE.

1. *Proof of Debtor's Possession After Bill of Sale.* The act of a debtor in putting another in the constructive possession of his property under a bill of sale does not conclude his creditors from showing that the debtor himself was, and claimed to be, in possession.—*Sayward v. Nunan*..... 87
2. *Proof of Condition and Value of Property.* Proof of the condition and value of property before and after the date of a bill of sale thereof is inadmissible in the absence of proof that the condition and quantity of the property was the same at such times as it was when the bill of sale was executed.—*Id.* 87
3. *Opinion Evidence—Testimony of Actual Observer.* In an action for injuries received by a passenger as the result of a collision between an electric car and a wagon, where a witness has already testified that the car was running at the rate of about twelve miles an hour; that the wagon on the track was in plain view for a distance of four hundred feet; that the motorman commenced ringing the bell as a warning of his approach at about that distance from the wagon; that the man in the wagon made no attempt to get off the track

EVIDENCE — CONTINUED.

until the car was pretty close to him, and that when the motorman found that the wagon was not going to get out of the way in time, he made every effort possible to stop the car, but that he was then within a hundred feet of the wagon, there is no error in permitting the witness, in answer to the question, "What was there, if anything, to prevent the motorman stopping the car and applying the brakes a long time before he did?" to testify that "He was running at too high speed to stop it in that distance."—*Sears v. Seattle, etc., Street Ry. Co.* 227

4. *Same.* The general rule of evidence that witnesses may not give opinions as to matters of fact does not preclude the evidence of common observers, who may state the results of their observations in regard to ordinary appearances and conditions of things which cannot be produced to a jury exactly as they were observed by the witness at the time.—*Id.* 227

5. *Action Upon Account—Immaterial Evidence.* Where an order upon a debtor is given by a creditor to a third party to whom he is indebted, the amount of indebtedness to such third party is immaterial in establishing the amount due from the debtor to the creditor.—*Patchen v. Parke & Lacy Machinery Co.* 486

6. *Contract for Conveyance of Lands—Parol Evidence.* Parol evidence is not admissible to show the terms and conditions upon which deeds for the exchange of lands had been left with a third person, when such deeds had not been delivered in escrow, and there was no written contract for the conveyance of the lands.—*Nichols v. Oppermann.* 618

See ALTERATION OF INSTRUMENTS, 2; ARSON, 2; ATTACHMENT, 8, 4; BANKS AND BANKING, 4; CORPORATIONS, 8; CRIMINAL LAW, 2-5; FRAUDULENT CONVEYANCES, 3, 6, 11; HORSE AND STREET RAILROADS, 2-4; LARCENY; MUNICIPAL CORPORATIONS, 40; PARTIES, 2; RELEASE AND DISCHARGE.

EXECUTION.

1. *Proceedings Supplementary—Garnishment—Practice.* In garnishment proceedings supplementary to execution it is unnecessary that the affidavit filed as a basis for the order summoning a garnishee should state that execution had been issued against the judgment debtor.—*Timm v. Stegman* 13

EXECUTION — CONTINUED.

2. *Same — Judgment Against Garnishee — Insufficient Evidence.* Judgment against a garnishee is unwarranted where it appears from the evidence that he signed a promissory note in his own name in favor of the principal debtor, but that his liability thereon was in fact as a trustee for others; that the note was not due; and that it was in the hands of a third party not before the court.— *Id.*..... 13
3. *Equitable Interest.* An equitable interest in land can be sold on execution under the statutes of this state.— *Calhoun v. Leary.*..... 17
4. *Trial of Title — Unnecessary Pleadings.* The trial of title to property levied upon, where it is claimed by a third party, is based upon the allegations of the affidavit setting up ownership, and, a complaint being unnecessary, it is not error to strike it from the files.— *Sayward v. Nunan.*..... 87
5. *Same — Proper Judgment Against Claimant.* Upon the trial of title to property levied upon under execution, the proper judgment against a claimant who fails to make good his title to the property is for the amount of the execution creditors' claim, not exceeding the value of the property in controversy, irrespective of any priority the claimant may be entitled to as against such creditor.— *Id.*..... 87

See CHATTEL MORTGAGES, 1; CORPORATIONS, 11, 12;
HUSBAND AND WIFE, 2.

EXECUTORS AND ADMINISTRATORS.

1. *Administration by Husband's Executors Upon Community Property.* Where a husband acts as executor of a deceased wife's will, but at the time of his death has not completed administration upon her estate, and the executors of his own will take possession and administer upon all the property the husband held, including the separate and community estate of the deceased wife, such administration by his executors is merely irregular and not void, nor do the ordinary rules relating to the liability of executors *de son tort* apply thereto.— *In re Hill's Estate* 285
2. *Same — When Administrator of Wife's Estate Estopped.* In such a case, although it is proper that the community estate should be administered upon by the legal representative of the wife, she having died first, yet where an administrator with the will annexed has been appointed for the wife's estate subsequent to the death of the husband, who was acting as executor thereof, and such administrator does not proceed

EXECUTORS AND ADMINISTRATORS—CONTINUED.

with diligence to obtain possession of the community property, but sits by for a year and a half and sees the same administered in the settlement of the estate of the husband, such administrator is estopped from setting up any claim of right to administer the community estate.—*Id.*..... 285

EXEMPTIONS.

Absconding Householder—Wife Cannot Claim. Where a person has left the state with intent to defraud his creditors his property is not exempt from attachment, and his wife cannot claim the statutory exemption in his behalf.—*Carter v. Davis*..... 327

FACTORS AND BROKERS.

1. *Real Estate Brokers—Commissions.* Where land is placed in the hands of a real estate broker for sale on certain terms, and the broker introduces to the owner prospective purchasers, who refuse to buy the land on such terms, but take an option on it for sixty days, the broker is not entitled to any commission.—*Dwyer v. Raborn*..... 218
2. *Same—Agent of Both Seller and Purchaser.* A real estate broker, who secretly acts as the agent both of the purchaser and of the seller in a sale of land, is guilty of constructive fraud, and is not entitled to recover commissions from the seller; and should be non-suited in an action for commissions, if such fact sufficiently appears from the evidence.—*Shepard v. Hill*..... 605

FRAUD. See FACTORS AND BROKERS, 2.

FRAUDS, STATUTE OF.

Parol Contract to Convey Land—Possession Taken After Vendor's Death. Where a written contract for the conveyance of land is so indefinite that it cannot be determined without resort to parol testimony, the contract is not taken without the operation of the statute of frauds by possession of the land taken subsequent to the death of the party agreeing to convey.—*Rochester v. Yesler's Estate*..... 114
See SALE, 2.

FRAUDULENT CONVEYANCES.

1. *Conveyance by Husband to Wife.* The fraudulent conveyance by a husband to his wife of community property is not a transfer by one joint debtor to another.—*Ewing v. Van Wagenen*..... 39

FRAUDULENT CONVEYANCES—CONTINUED.

2. *Assignment of Lease of Wild Lands—Proof of Value of Lease.* The assignment of a lease of wild lands will not be set aside as a fraud upon creditors, although the consideration therefor was slight, when there is no proof that the lease was of some value.—*Klosterman v. Vader*..... 99
3. *Sufficiency of Evidence.* A judgment holding certain conveyances fraudulent on the ground that they were executed to hinder, delay and defraud creditors will not be disturbed where the evidence shows that, at the time of the transfers, the grantors were indebted to their grantee in the sum of \$1,750, which was amply secured by collateral notes, and otherwise; that one of the grantors and the grantee were partners in business; that at the time of the transfers a suit was being prosecuted against the grantors to recover the sum of \$20,000, although this suit was subsequently decided in favor of the defendants; that the total indebtedness of the grantors to the grantee, including loans and advancements subsequent to the conveyances, which, it was claimed, were intended merely as mortgages, never exceeded the sum of \$8,000, while the value of the property transferred was greatly in excess thereof; and that after the conveyances the grantors still continued to collect rent from various tenants.—*Burt v. Agassiz*..... 242
4. *Deed Intended as Mortgage.* A conveyance of land intended as a mortgage to secure an existing debt is not void as to creditors, in the absence of any showing that the value of the land is greatly in excess of the indebtedness which it is intended to secure.—*Samuel v. Killenger*..... 261
5. *Trust Deed.* A conveyance of property in trust for those to whom it equitably belongs can in no event be void as to creditors.—*Id*..... 261
6. *Evidence.* The fact that, within a few days after the conveyance of certain land for a given consideration, another conveyance is made of the same land, with additional land, to the same grantee and for the same consideration as expressed in the former deed, is not evidence of fraud.—*Id*..... 261
7. *Preference of Creditors.* A debtor, although in failing circumstances, may pay or secure any one or more of his creditors, to the exclusion of others.—*Id*..... 261
8. *Insolvent Corporations—Preferring Creditors.* A chattel mortgage given by a dairy association cannot be held void on the ground that it is a preference of creditors by an insolvent corporation, when the evidence shows that the

FRAUDULENT CONVEYANCES—CONTINUED.

- association had not enough money on hand to pay all of its indebtedness, but that its business was profitable; and that the mortgage was given for the purpose of inducing the mortgagee to continue to supply milk to the association, in order that its business might be carried on.—*Leslie v. Wilshire* 282
9. *Assignment for Benefit of Creditors—Preference—Notice of Fraudulent Intent.* Where a debtor in failing circumstances confesses judgment in favor of certain creditors, who have knowledge of his condition, after the intention to make an assignment had been fully formed in his mind, and follows the confessions of judgment with an assignment for the benefit of creditors, such judgment liens are voidable, and the assignee, or a receiver appointed by the court, is entitled to the possession of all the debtor's property for the purpose of making *pro rata* distribution among all the *bona fide* creditors.—*Hyman v. Barmon* 516
10. *Same—When Client Chargeable with Attorney's Knowledge.* A creditor is chargeable with the knowledge of his attorney that a debtor intends to make an assignment at the time he confesses judgment in favor of the creditor.—*Id.* 516
11. *Sufficiency of Evidence.* A debtor in failing circumstances made a bill of sale of his stock of goods and store fixtures to the plaintiff, the consideration paid by the plaintiff being the surrender of three promissory notes executed by the debtor as follows: One for \$500, to the plaintiff, one for \$2,700, to the debtor's father, and one for \$250, to the debtor's brother-in-law, the latter two notes having been turned over to the plaintiff by the father and brother-in-law in payment of valid indebtedness from them to him; it was not clearly established that the debtor owed these sums to his father and brother-in-law, but it was clearly shown that the latter parties owed the sums named to the plaintiff, and that the plaintiff acted in good faith, without knowledge of the debtor's other indebtedness, or of any intent on his part to defraud. The plaintiff took possession of the stock of goods, but shortly thereafter it was attached by other creditors and sold as the property of the debtor, although the creditors had full notice of the plaintiff's rights. *Held*, That the plaintiff was entitled to recover the value of the stock of goods and store fixtures.—*Furth v. Snell* 542

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

GARNISHMENT.

Foreign Corporations—Garnishment in Another State—Defense to Action on Policy. Where a foreign fire insurance company has been garnished in another state upon its indebtedness to a citizen of this state upon its policy of insurance, such fact is a good defense to an action in this state against the corporation.—*Neufelder v. German American Ins. Co.*..... 336

See APPEAL, 1; EXECUTION, 1, 2.

GUARDIAN AND WARD. See INSANITY, 1.

HABEAS CORPUS.

1. *Grounds for Writ—Former Jeopardy.* The supreme court cannot, upon an application for *habeas corpus*, pass upon the question of former jeopardy of the petitioner, but such plea must be raised and tried in the lower court; nor can jurisdiction to determine such question be conferred upon the supreme court by stipulation accompanying the petition for *habeas corpus*.—*Steiner v. Nerton*..... 23
2. *Commitment Till Payment of Fine and Costs—Invalid Judgment for Costs Not Ground for Writ.* *Habeas corpus* will not lie to secure the release of a prisoner on the ground that he has been committed under the judgment of the supreme court of the state, until a certain fine and costs are paid, and the judgment for costs is in fact in favor of the Territory and not of the State of Washington, when the commitment does not require the payment of such costs as a prerequisite of the prisoner's discharge.—*Way v. Woolery*..... 157

HORSE AND STREET RAILROADS.

1. *Collision With Horses and Vehicles—Contributory Negligence.* Where a driver attempts to cross a track in front of a rapidly approaching electric car, knowing of its approach, and his team is struck and injured by the car, he cannot recover, for the reason that his own negligence contributed to the injury.—*Christensen v. Union Trunk Line*..... 75
2. *Evidence—Proof of Former Negligence.* In an action against an electric railway company for negligence it is irrelevant to prove that the motorman had run his car at a high rate of speed on other occasions.—*Id.*..... 75
3. *Same—Proof as to Conductors.* In the absence of proof that a conductor is necessary for the safe management of an

HORSE AND STREET RAILROADS—CONTINUED.

electric car, it is error to admit testimony showing that there was no conductor upon a car at the time of an accident.—

Id 75

4. *Same—Discharge of Motorman.* Proof of the discharge of the motorman after an accident is immaterial in an action against the company for his alleged negligence.—*Id* 75

See CARRIERS, 1, 2.

HUSBAND AND WIFE.

1. *Community Property—Equitable Interest—Estoppel.* Where a husband and wife mutually agree that property acquired by each shall be treated as separate property, and the husband acquires an equitable title to real estate which he transfers to a *bona fide* purchaser who has knowledge of such agreement, both the wife and the community are estopped from asserting any community interest in the land.—*Calhoun v. Leary* 17

2. *Community Debts—Execution Sale.* Every debt created by the husband during the existence of marriage is, *prima facie*, a community debt; and a sale of land on execution on a judgment rendered for such debt will divest the title of the community to the land.—*Id* 17

3. *Equitable Interest of Husband—Rights of Community.* Where the husband does not acquire other than an equitable interest in land, the community, or the wife as a member thereof, obtains no such interest therein as can be asserted against one having superior equities.—*Id* 17

4. *Mortgage of Community Realty Executed by Husband—Foreclosure.* Although a mortgage of real estate may have been executed by the husband alone, foreclosure thereof may be had, when the mortgage itself declares that the maker is an unmarried man, and there is little or no testimony showing knowledge on the part of the mortgagee of the maker's marriage.—*Schwabacher Bros. & Co. v. Van Reypen* 154

5. *Promissory Note Given by Husband—Liability of Wife—Community Debt.* A wife cannot be joined as a party defendant to a suit upon a promissory note executed by the husband alone, although the complaint may allege that the note was given for a community debt.—*Commercial Bank v. Scott* 499

HUSBAND AND WIFE—CONTINUED.

6. *Community Property—Earnings of Wife.* Money saved by a wife from the funds given her by her husband for household expenses does not thereby lose its community character and become her separate property.—*Abbott v. Wetherby*, 507
7. *Same—Gift by Husband to Wife.* A statement by a husband that his wife had selected certain lots; that she had always worked hard and earned a great deal of money, and that he intended the land as a home for her, cannot be construed as creating a separate estate therein by gift, when the land had been purchased with community funds.—*Id.* 507
8. *Community Really—Deed of Husband—What Title Passes.* Where husband and wife are living together, a deed executed by the husband alone will pass no interest in community real estate, although the husband may have represented himself as a single man, and have so recited in the deed.—*Adams v. Black*..... 528

See ASSUMPSIT; EXECUTORS AND ADMINISTRATORS, 1, 2; EXEMPTIONS; FRAUDULENT CONVEYANCES, 1.

INDICTMENT AND INFORMATION.

1. *Prosecution in Name of State—What is Sufficient Allegation.* An information is sufficient to show, that the prosecution is in the name of the state when the caption of the information entitles the case as the "State of Washington against" the defendants, naming them.—*State v. Devine*..... 587
2. *Resisting Officer—Sufficiency of Information.* Although the information in a prosecution for resisting an officer does not allege that defendant knew that the officer was a deputy sheriff, when he resisted him, yet, if such knowledge on the part of the defendant sufficiently appears from the reading of the information as a whole, the information is sufficient, under the code, to sustain a verdict, the defendant having gone to trial without interposing a demurrer.—*State v. Brown* 609
3. *Same.* In a prosecution for resisting an officer in the service of a legal warrant, a statement of the facts constituting its legality is better pleading than to allege that the warrant was a legal warrant.—*Id.*..... 609

See ARSON, 1, 2; BURGLARY, 1, 2.

INJUNCTION. See BANKS AND BANKING, 1, 2; JUDGMENT, 2, 3; MUNICIPAL CORPORATIONS, 28.

INSANITY.

1. *Habitual Drunkard—Appointment of Guardian.* The appointment of a guardian for the person and estate of one whose mind has become unsound from the constant and excessive use of alcoholic liquors, thereby rendering him incapable of conducting his own affairs, is authorized by § 1154, Code Proc.—*In re Wetmore's Guardianship* 271
2. *Same—When Want of Jurisdiction Cured.* Although the court did not have jurisdiction to appoint a guardian for a habitual drunkard, for the reason that the latter was not before the court at the time, yet where, without attacking the proceedings, he subsequently submits himself to the jurisdiction of the court by filing a petition denying the allegation of the original petition, and asking for an investigation upon the merits and for an order setting aside the appointment of such guardian, the court thereby obtains jurisdiction of his person, and from any final order in the premises appeal will lie.—*Id.* 271

INSOLVENCY.

Effect of Repeal Pending Proceedings. Where proceedings in insolvency were begun under the provisions of the Code of 1881, and a receiver appointed to take charge of the insolvent estate for the benefit of creditors, the repeal of the Code provisions by the act of March 6, 1890, while the proceedings were pending, will not affect the title of an assignee appointed in such insolvency proceedings subsequent to the repeal.—*Ewing v. Van Wagenen* 39

INTEREST.

National Banks—May Charge Ten Per Cent. Under the legislation of this state the established rate of interest is ten per cent., and can be properly charged by national banks.—*Yakima National Bank v. Knipe* 348

See DAMAGES, 2; JUDGMENT, 6; MUNICIPAL CORPORATIONS, 13, 16, 17; NEGOTIABLE INSTRUMENTS, 3, 4.

JUDGE. See APPEAL, 19.

JUDGMENT.

1. *Revival of One Judgment by Setting Aside Another Overruling It.* A decree vesting one-half of community property in the children of a testator remains unaffected by the setting aside of a decree rendered in the same cause upon proceedings in intervention declaring the rights of the

JUDGMENT—CONTINUED.

- parties to be as decreed in the original action, except that the interests of all parties should be subject to the lien of a certain mortgage.—*Mason v. McLean*..... 31
2. *Replevin of Partnership Goods by One Partner—Enjoining Judgment.* Where one partner has replevied partnership goods which had been levied upon under a judgment against his co-partner, he cannot enjoin the enforcement of a judgment against him for the return of the goods, or for their value, on the ground that the goods were the property of an insolvent partnership and that he had appropriated them to the use of said partnership.—*Bowman v. McGregor*..... 118
3. *Erroneous Judgment—Remedy by Appeal.* Where the proof in a replevin suit shows that the defendant has merely a special interest in the property levied upon and does not show the amount, an erroneous judgment against plaintiff should be remedied by appeal and not by injunction.—*Id*..... 118
4. *Setting Aside Default Judgment.* Where judgment has been taken against defendant by default for his failure to answer, the judgment should be set aside when it appears that he has a defense upon the merits of the case and was misled by a statement of plaintiff's attorney that the cause would be tried several months later than the time at which default was taken.—*Bast v. Hyson*..... 170
5. *Default Judgment—When Irregularity Cured.* Although a formal default may not have been entered against a defendant before the trial of a cause, yet the supreme court will uphold a judgment against him on appeal, where it appears by the record that the time for answering had expired, and that testimony was given at the trial as to the amounts due from him to plaintiffs.—*Proulx v. Stetson & Post Mill Co.*..... 473
6. *Judgment of Supreme Court—Construction.* Where the supreme court, in reversing a decree of the superior court in a suit for the foreclosure of mechanics' liens, virtually affirms the decree as to certain claimants, who were allowed interest on their claims by the judgment appealed from, by directing a decree in favor of such claimants "for the amounts claimed," the claimants are entitled to interest accrued before the rendition of judgment in the supreme court.—*Fairhaven Land Co. v. Jordan*..... 551
7. *Failure to Answer Interrogatories.* Judgment may be given against defendants in an action for failure to answer inter-

JUDGMENT—CONTINUED.

- rogatories within the time prescribed by statute, although a formal order on the part of the court requiring defendants to answer such interrogatories has not been made.—*Livesley v. O'Brien*..... 553
8. *Vacation of Judgment—Discretion of Court.* A motion to vacate and set aside a judgment is directed to the discretion of the trial court, and its action in passing thereon will not be reversed on appeal, unless the showing made therefor leaves no room for the exercise of discretion by the lower court.—*Id.*..... 553
- See APPEAL, 9, 14, 16; COSTS, 3, 4; EXECUTION, 5; HABEAS CORPUS, 2.

JURISDICTION. See APPEAL, 1; CERTIORARI, 2; COURTS, 2, 3; HABEAS CORPUS, 1; INSANITY, 2.

JURY.

1. *Challenge to Juror.* A challenge to a juror for cause should specify the grounds of ineligibility.—*State v. Biles*..... 186
2. *Drawing Jury—Deputy Sheriff Disqualified to Serve.* Under §§ 59, 61, Code Proc., prescribing the method of drawing a jury from the jury list certified by the county commissioners, a deputy sheriff is not authorized to act in place of the sheriff.—*State v. Payne*..... 563
3. *Special Venire—Failure of Sheriff to Make Return.* The fact that a sheriff does not make a return of his doings in summoning a special venire of jurors until after the commencement of the trial, is not ground for a challenge.—*Id.*, 563
4. *Certificate to Jury List.* The certificate of the officers to a jury list drawn by them should state how the drawing was actually done, and not simply that it was conducted fairly and as provided by law.—*Id.*..... 563

LANDLORD AND TENANT.

1. *Sale of Leased Land—Tender by Purchaser of New Lease—Refusal of Tenant to Accept.* Where a tenant is in possession of land under a written contract of lease, a subsequent purchaser of the land, with full knowledge thereof, cannot maintain an action for ejectment or unlawful detainer against the tenant, on the ground that a portion of the agreement had not been reduced to writing, and that the tenant refused to accept a new lease with such omitted portion incorporated.—*Roderick v. Swanson*..... 222

LANDLORD AND TENANT—CONTINUED.

2. *Unlawful Detainer—Sufficiency of Evidence.* The verdict of the jury for defendant in an action of unlawful detainer will not be disturbed, where the relation of landlord and tenant is not clearly established by the evidence.—*Seattle Operating Co. v. Cavanaugh*..... 325
3. *Destruction of Premises—Recovery of Rent Paid in Advance.* Where a building, occupied by a tenant under a lease whereby he covenants to pay a certain rental per month in advance, is destroyed by fire, the tenant may recover the money paid in advance for that portion of the month remaining after the destruction of the premises.—*Porter v. Tull* 408

See ASSUMPSIT; PARTIES, 1.

LARCENY.

Sufficiency of Evidence. The evidence is insufficient to sustain the conviction of defendant for the crime of grand larceny, when it is shown that the defendant and A and C, who had been drinking together, went to bed in a lodging house, occupying one room; that the defendant and A got up in the night, leaving C in the room with the door unlocked, and repaired to a neighboring saloon, where they spent the night in drinking, the defendant paying for the drinks with a twenty dollar gold piece; that C discovered in the morning that he had been robbed of his pocket book containing a twenty dollar gold piece; but there was no evidence identifying the coin spent by defendant as the one stolen from C, and defendant proved that he had received two twenty dollar gold pieces, in addition to silver coin, about a month prior thereto from a man for whom he had been working; and it was further shown that defendant had and was spending money on the night of the larceny and before the alleged commission of the crime.—*State v. Payne*..... 563

LIMITATION OF ACTIONS.

Limitation Reduced from Twenty to Ten Years—When Time Begins to Run. Under the statute of 1881, which reduced the limitation for the commencement of actions to recover the possession of real estate from twenty to ten years after the accrual of the cause of action, a party whose action had not been barred under the old law has the full period of ten years after the taking effect of the act of 1881 in which to commence such action, although the time had begun to run under the former law.—*Packscher v. Fuller*..... 534

LOGS AND LOGGING.

1. *Liens — Sufficiency of Claim.* Under the provision of § 1679, Gen. Stat., that every person performing labor upon, or who shall assist in obtaining or securing saw logs, shall have a lien therefor, a notice of lien that alleges that the claim is for labor performed upon, and assistance rendered in preparing and securing certain saw logs, is sufficiently definite.— *Overbeck v. Calligan*..... 342
2. *Time of Filing Liens.* The thirty days' limitation for the filing of liens for labor in securing saw logs does not begin to run from the time such logs are rafted into booms, but from the time the services rendered in securing the logs ends.— *Id.*..... 342
3. *Liens — Upon What Property May be Claimed — For What Labor.* Under §§ 1679 and 1690, Gen. Stat., one who has performed labor in securing saw logs may enforce a lien against a part of the property upon which he has expended labor for all the labor performed upon the whole lot of saw logs, provided the logs all belonged to the same owner, and the labor was performed under one entire contract.— *Proulx v. Stetson & Post Mill Co.*..... 478
4. *Same — Construction of Logging Roads.* One who constructs a necessary road by which certain logs are taken from the forest to the mill, or to the water and afterwards to the mill, or to market, as much assists in obtaining and securing such logs as if he were engaged in cutting or sawing them, and is entitled to a lien for such labor.— *Id.*..... 478
5. *Mistakes in Claim — Effect.* An innocent mistake in a lien notice as to the exact amount due a laborer for his hire will not defeat the lien.— *Id.*..... 478

See VENUE IN CIVIL CASES.

MANDAMUS. See APPEAL, 18; COURTS, 3.

MASTER AND SERVANT.

1. *Action by Servant for Injuries — Contributory Negligence.* Where an employé of a coal company gets upon one end of the brake beam of the company's engine, in order to ride through a narrow and dark tunnel on the way to the office to get his pay, and is injured by a projecting rock in the tunnel striking his knee and throwing him to the ground, breaking his leg and dislocating his hip, he is guilty of contributory negligence although riding on the engine at the direction of a foreman, it not being customary for the men

MASTER AND SERVANT—CONTINUED.

- to ride upon the brake beam, and the company having provided another way to reach the office than that through the tunnel.—*Richardson v. Carbon Hill Coal Co.*..... 52
2. *Liability for Negligence of Physician.* In an action against a company for injuries sustained in consequence of the negligent and unskillful treatment of the surgeon provided by the company, a non-suit is not warranted where the evidence shows that the company retained one dollar per month from the plaintiff's pay for hospital dues and a physician; that the company by the acts of its officers assumed to provide a physician to treat plaintiff, and that such physician was a negligent and unfit person, although there was no proof of any express contract relation existing between the company and plaintiff with reference to providing him a hospital and a physician, and he was in fact taken to the house of a relative instead of to the hospital.—*Id.*..... 52
3. *Fellow Servants—Yard Boss as Vice Principal.* A yard boss of a lumber yard who has entire control of the yard, with power to hire and discharge workmen, and to employ them under his orders, is a vice principal, and not a fellow servant of the men who work under his control and superintendence.—*Zintek v. Stimson Mill Co.*..... 178
4. *Negligence of Yard Boss—Liability of Master.* In an action against a mill company for the death of a workman caused by the falling of a lumber pile which had been negligently piled, it is error to non-suit the plaintiffs, when the testimony tends to show that a yard boss had entire charge of the yard and of the piling of lumber, that he hired and discharged workmen, and that they worked under his orders; and that the injury was due to his negligence.—*Id.*..... 178
5. *Fellow Servants—Fire Boss in Coal Mine.* A "fire boss" in a coal mine, whose duty it is to direct the men to leave the place where they are working and go to another place if, in his opinion, continuance at work in such place is dangerous, but who has no control of the action of the miners in the prosecution of their work, does not stand in the position of a vice principal.—*Morgan v. Carbon Hill Coal Co.*..... 577

MECHANICS' LIENS.

1. *For What Materials.* Where materials have been specially designed for a certain building and furnished the contractor therefor, a lien may be claimed for the whole amount furnished, although only a portion has been used in the construction in consequence of the contractor having sus-

MECHANICS' LIENS—CONTINUED.

- pended work on the building.—*Huttig Bros. Mfg. Co. v. Denny Hotel Co.*..... 122
2. *Second Notice After Premature Filing of Claim.* Where a notice of lien is prematurely filed for the reason that the last portion of the materials furnished had not arrived, although on the way, the claimant has a right to file a second notice after the delivery of the materials.—*Id.*..... 122
3. *Claim of Foreign Corporation.* Under §1667, Gen. Stat., it is unnecessary that the attorney verifying a mechanic's lien notice for a foreign corporation should be specially authorized by appointment and the appointment filed in the office of the secretary of state.—*Id.*..... 122
4. *Materials Furnished After Cessation of Work.* Where there is a partial cessation of work upon a building because of differences between the owner and contractor, but the abandonment of the contract is not complete and permanent until after the furnishing of certain materials, lien may be claimed therefor.—*Id.*..... 122
5. *Enforcement—Attorney's Fee.* An attorney's fee of \$2,000 for enforcing a lien of \$21,000 is excessive and should be reduced to the sum of \$1,000, or lower.—*Id.*..... 122
6. *Priority of Mortgage and Mechanics' Liens.* Under the provisions of our statutes, a material man can claim a lien only from the time he commenced to furnish materials for the building, and if such time is subsequent to the creation of a mortgage lien, of which he had notice, his claim for materials is subject thereto.—*Id.*..... 122
7. *Same.* A mechanic's lien will not date, for the purpose of priority over mortgage and other liens, from the time the claimant commenced the preparation of the materials in another state, which, by the contract, were to be delivered at a certain building in course of construction in this state.—*Id.*..... 122
8. *Insufficiency of Description.* A lien notice which describes the property as "all of lot 5 in block 9 . . . except the west 20 feet of said lot; and that said building is known as the Brodek-Schlessinger building, and is on the north-west corner of Third and Washington streets, in said city," is insufficient to create a valid lien, when the building also covers, in addition to the tract specified, the south half of lot 6.—*Whittier v. Stetson & Post Mill Co.*..... 190
9. *Mistake in Amount of Claim—Remitting Excess.* Where the owners of adjoining parcels of land jointly construct build-

MECHANICS' LIENS—CONTINUED.

ings thereon under contract with the same contractors, and a lien is claimed for glass furnished both buildings by a sub-contractor, who understands that the whole structure is being built by B. & S., while in fact one N. is the owner of a portion thereof, but the claim of lien as made out by his attorneys correctly describes the B. & S. property, and by mistake seeks to charge the same with the glass furnished for N.'s portion, the mistake may, on the trial, be rectified by remitting the excessive claim.—*Id.* 190

10. *Materials Furnished Holder of Equitable Title—Liability of Owner of Fee.* Where materials are furnished for a building to one who has possession of the land upon which the building is being constructed under a contract of purchase, a lien can attach only to the interest of the holder of such contract; and on a forfeiture of his rights thereunder, the owner of the legal title is not liable to personal judgment for such materials, nor is his interest in the land subject to a mechanic's lien therefor.—*Mentzer v. Peters*..... 540

See CORPORATIONS, 1; ESTOPPEL, 1.

MORTGAGES.

Foreclosure of Mortgage—Attorney Fees. Although a mortgage may provide for the payment to the mortgagee out of the proceeds of sale on foreclosure, of "counsel fees at the rate of ten per cent. upon the amount which may be found to be due for principal and interest by the said decree" of sale, the mortgagor is not liable to the payment of such counsel fee where, before the expiration of the time for answering in the foreclosure suit, he pays into court the full amount of principal and interest and costs to date.—*Lammon v. Austin*..... 199

MUNICIPAL CORPORATIONS.

1. *Purchase of Water Works—Ordinance.* An ordinance providing for the purchase by a city of the existing plant of a light and water company, embracing its water works and electric light plant, with a certain exception, and that the city extend the water works by a gravity system from certain springs, is sufficient without the ordinance containing a schedule showing the extent of territory covered, the miles of pipe laid and of what sizes, the sources of water supply and the extent of the rights of the seller therein, the quantity of water available, and if brought to the city in aqueduct or flume, of what capacity, the capacity of the

MUNICIPAL CORPORATIONS—CONTINUED.

- pumping stations and their character, and the amount of land and where situate.—*Seymour v. Tacoma*..... 188
2. *Same*—*Issuance of Bonds—Submission to Voters*. Under the act of March 26, 1890 (Laws 1889-90, p. 520), and the amendment thereof (Laws 1891, p. 326), the question of purchasing water works and light plant, and paying therefor with the proceeds of bonds, may be submitted to the voters at the same election as one proposition.—*Id*..... 188
3. *Same*—*Election Notice*. It is not necessary that the ordinance itself providing for the purchase of water works should be set out in full in the election notice where the latter contains a fair statement of the matters to be voted upon.—*Id*..... 188
4. *Liability for Injury to Firemen*. A municipal corporation is not liable for the negligence of firemen engaged in the line of their duty.—*Lawson v. Seattle*..... 184
5. *Same*. The apparatus used by a fire company being under the special control and inspection of such company and not of the city, the city cannot be held liable for injuries received on account of the defective condition of the apparatus.—*Id*..... 184
6. *Taxation—Assessment in Unclassified Cities*. The act of March 9, 1893, entitled "An act to provide for the assessment and collection of taxes in municipal corporations of the third and fourth class in the State of Washington," does not apply to the city of Port Townsend, as the latter has not become a classified city under the laws of the state.—*Port Townsend v. Sheehan*..... 220
7. *Same*. The assessor of the county of Jefferson is not authorized by the general revenue law approved March 15, 1893, to make the assessment for the city of Port Townsend, as a part of his duties as such county assessor.—*Id*..... 220
8. *Cities of First Class—Collection of Taxes by County Treasurer—Constitutional Law*. The act of March 9, 1893, entitled "An act to provide for the assessment and collection of taxes of cities of the first class, and specifying the duties of certain county officers in regard thereto," does not violate any constitutional provision relating to municipal corporations, as it leaves the power to impose taxes unaffected, but works an amendment to all conflicting provisions of charters of cities of the first class upon the subject of the assessment and collection of taxes.—*State, ex rel. Seattle, v. Carson*..... 250

MUNICIPAL CORPORATIONS—CONTINUED.

9. *Same.* A legislative act which provides that the county treasurer shall be charged with the duty of assessing and collecting city taxes, and that the city shall pay him therefor the sum of \$500 per year, does not violate the constitutional inhibition against increasing the compensation of any public officer during his term of office.— *Id.* 250
10. *Same—Effect of Repealing Clause in General Revenue Law.* The act of March 15, 1893, repealing "all acts and parts of acts heretofore enacted by the legislature of the Territory or State of Washington providing for the assessment and collection of taxes in this state," affects laws relating to state taxation generally, and has no application to the special provisions of the law of March 9, 1893, relating to the collection of taxes in cities of the first class.— *Id.* 250
11. *Street Improvements—Payment Out of Special Fund—Liability of City.* Where, under authority of its charter, an ordinance of the city provides that certain classes of street improvements shall be paid for by special assessment against the property fronting thereon, such provisions become a part of the contract, and the persons contracting to make such improvements must look to payment from a special fund; and the remedy of the contractor remains the same although the charter provisions under which the improvement was made have been superseded.— *Soule v. Seattle* 315
12. *Same.* Where a city has already reached its constitutional limit of indebtedness, it has no power to render itself liable for the cost of street improvements contracted for subsequent thereto, even although the city fails to levy an assessment and provide a special fund for such improvement, as it is required by ordinance to do.— *Id.* 315
13. *Same—Interest.* Where city officials have issued warrants upon a special fund which was to be collected from property benefited by the construction of street improvements, the city is not liable for interest thereon, until the delinquency of the assessments made for such improvements.— *Id.* 315
14. *Streets Over Tide Lands.* Under the constitution and laws of this state cities of the first class have, as against private parties, the absolute right to extend their streets over and across the tide lands lying within their corporate limits, subject only to the rights of navigation in the waters covering such tide lands.— *Columbia, etc., R. R. Co. v. Seattle* 332
15. *Same.* Where a city, by an ordinance regularly passed, recognizes the existence of a street over a certain portion

MUNICIPAL CORPORATIONS—CONTINUED.

- of tide land, and provides for the widening and extension thereof, and the city, by its proceedings, is estopped to deny that such location is a street, such location must be held to be a street as to the public generally, and no private person can question the city's right to establish it.— *Id.*..... 332
16. *Warrants—Rate of Interest.* In this state, municipal corporations are liable for interest at the legal rate—ten per centum—upon the amounts due from them, from the time that a warrant therefor has been issued and payment thereof refused for want of funds.— *Seymour v. Spokane* 362
17. *Same.* Ch. 2, § 19, of the freeholders' charter of Spokane, limiting the interest upon city warrants to 8 per cent. per annum, applies only to warrants given for money borrowed on the credit of the city.— *Id.*..... 362
18. *Bonds for Internal Improvements—Constitutional Law—Cities of First Class.* The act of March 9, 1893, entitled "An act relating to internal improvements in cities, authorizing the issuance and collection of bonds upon the property benefited by local improvements, and declaring an emergency," is constitutional, and is applicable to cities of the first class, as well as to all other cities.— *Germond v. Tacoma* 365
19. *Taxation in Cities of First Class—Assessment by County Assessor.* The general revenue law adopted March 15, 1893, requiring that the names of persons to whom personal property is assessed shall be listed alphabetically in the roll, and that real estate shall be listed numerically, must be construed in connection with the provisions of the act of March 9, 1893, requiring assessors in counties containing cities of the first class to list the property within the limits of any such city in as compact a form as practicable on the assessment roll, and when, by reason of a change in the boundaries of any city, or otherwise, the rate of taxes is required to differ in different districts thereof, the assessor shall properly segregate the real and personal property in each district so that each rate of taxation may be readily applied to property lawfully coming thereunder; and for the purposes of city assessments, the making of separate lists for different districts, which shall themselves be arranged alphabetically, in the case of personal property, and numerically in the case of real property, will be a full compliance with the statute.— *State, ex rel. Seattle, v. Abrahams* 372
20. *Vagrancy—Conviction Under Municipal Ordinance.* Although a city may be authorized to punish, but not to define, the crime of "vagrancy," yet a conviction under an

MUNICIPAL CORPORATIONS—CONTINUED.

- ordinance defining the crime and providing punishment therefor will be valid when the complaint states facts sufficient to constitute a crime under the statute defining vagrancy.—*Spokane v. Williams*..... 376
21. *Franchise for Right-of-way Over Streets—Estoppel.* Where the city of Seattle has laid out a street over tide land, and granted a railway company the right to lay tracks thereon, by virtue of provisions contained in the charter conferred upon the city by the territorial legislature, and its acts in exercising such power have been subsequently confirmed by the provision of the state constitution authorizing cities to extend their streets over tide lands, such city is estopped to dispute the validity of the franchise granted the railway company, on the ground of want of authority in the city to grant the right-of-way.—*Seattle v. Columbia, etc., R. R. Co*.... 379
22. *Same.* Although an ordinance of a city granting a railway company a right-of-way over a certain street may impose a condition that the railway must be constructed within a certain time, yet the city is estopped to urge that the grant is void by reason of a failure to comply with such conditions, when the ordinance has never been repealed and the city has permitted the railway company to continuously operate its road for several years.—*Id*..... 379
23. *Same—Changing Street Grade.* A municipal corporation has no right to make such a change in a street grade as will effect a destruction of the franchise theretofore granted a railway company to lay its tracks therein.—*Id*..... 379
24. *Perpetual Grant.* A municipal corporation may grant a perpetual franchise for a right-of-way over its streets.—*Id* 379
25. *When Assessment May be Used as Limitation on Indebtedness.* Under the charter of the city of Tacoma the assessment for purposes of taxation is not complete when the board of equalization has finished its labors in fixing and equalizing values, but the assessments, as equalized, must be added up on the rolls by the comptroller, and the same delivered by him to the city council before the assessment can be used as a basis for computing the limitation on municipal indebtedness.—*Seymour v. Tacoma*..... 427
26. *Purchase of Water Works—Issuance of Bonds—Notice of Election.* Where there has been a substantial compliance with the requirements of the law governing notice of elections, in the matter of voting municipal bonds, and there has been a fair election thereunder, the result cannot be

MUNICIPAL CORPORATIONS—CONTINUED.

- defeated by technical irregularities, such as posting the notice only twenty-six days instead of thirty, and failure to publish the notice in the official paper on the day immediately preceding the election, when the ordinance required publication for the thirty days next preceding election day.—*Id.* 427
27. *Same—Elections—Submission of Various Propositions.* An election for the issuance of bonds for the purchase of water works is not void for the reason that at the same election there was also submitted another proposition for the issuance of bonds for the construction of a bridge.—*Id.* 427
28. *Same—Limitation of Indebtedness—Enjoining Issuance of Bonds in Excess.* Where, subsequent to a municipal election for voting bonds for the purchase of water works, but prior to their issuance, a new assessment becomes operative, whereby the valuation of taxable property is reduced, the city may be enjoined from issuing bonds in excess of five per cent. of the existing valuation, although, under the valuation in force at the time of the election, the city could lawfully vote for a larger issue.—*Id.* 427
29. *Municipal Indebtedness—Limitation.* Under the act of 1891, the limitation upon municipal indebtedness for water works, light plants and sewers is five per cent. of the total valuation of property within the city limits. (*Metcalfe v. Seattle*, 1 Wash. 297, distinguished.)—*Id.* 427
30. *Same.* Where municipal bonds are not payable out of the general fund, but out of the proceeds of special taxes, the amount of cash in the general fund cannot be credited upon the amount of bonded indebtedness proposed so as to reduce the municipal indebtedness below the five per cent. limit.—*Id.* 427
31. *Illegal Contracts—Ratification.* Where the charter of a city provides against liability on any contract for the payment of any sum exceeding fifty dollars, unless the same is authorized by ordinance and made in writing and signed by the clerk or an authorized agent, the city cannot be rendered liable by the verbal agreement of the mayor and a council committee to pay certain sums exceeding fifty dollars, in addition to those duly authorized by the council; nor can the city, by its conduct, acquiesce in and ratify the acts of its officers, so as to make such verbal contract valid and binding retroactively.—*Arnott v. Spokane* 442
32. *Same—Discounting Warrants.* A municipal corporation has no authority to make a contract to discount its own

MUNICIPAL CORPORATIONS—CONTINUED.

- warrants; and the fact that the city has paid a portion of the discount on its warrants in accordance with an agreement of its officers, will not estop it from asserting the illegality of such a contract.— *Id.* 442
33. *Contracts With Municipal Corporation.* Wherever a person enters into a contract with an agent of a municipal corporation, he must at his peril ascertain the extent of such agent's authority, and, if he fails to do so, he alone must suffer the consequences.— *Id.* 442
34. *Franchise for Street Railway—Estoppel.* Where a street railway company, under an ordinance granting it a right to lay tracks in certain streets, lays and operates in connection with such system a track upon a street not named in its franchise, the city is estopped to interfere therewith, when it had knowledge thereof through its officers, the tracks, in fact, being laid under the direction of its superintendent of streets, and the company had, for several years, operated its railway thereon without objection, and paid taxes assessed upon the property by the city.—*Spokane St. Ry. Co. v. Spokane Falls* 521
35. *Same—Unauthorized Tracks—Abatement as Nuisance.* Where a street railway company holds a franchise to operate a cable railway upon certain streets, through compliance with the absolute conditions contained in the grant, but operates a horse railway instead of a cable railway upon one of the streets, the proper course for the city is, not to abate such horse railway as a nuisance, but to take such legal proceedings as will compel the operation of the road by cable instead of by horses.— *Id.* 521
36. *Same.* Although a street railway track constructed without authority may be technically a nuisance, yet where there is no general law of the city declaring such railway a nuisance and authorizing its abatement, the city is not authorized, under a charter provision empowering it "to cause any nuisance to be abated," to tear up such street railway track.— *Id.* 521
37. *Violation of Ordinances—Prosecution.* A prosecution for the violation of a city ordinance may be conducted in the name of the city instead of in the name of the state.—*Spokane v. Robison* 547
38. *Same—Complaint by Private Person.* The charter of the city of Spokane providing that the city attorney shall conduct all prosecutions for violations of its ordinances does

MUNICIPAL CORPORATIONS—CONTINUED.

not require that officer to subscribe and swear to the complaints therefor, and the prosecution may be had upon the complaint of any private person.—*Id.*..... 547

39. *Right to Prohibit Slaughter Houses.* Cities of the first class are authorized to prohibit the erection and maintenance of slaughter houses within their corporate limits.—*Id.*..... 547

40. *Same—Evidence.* In a prosecution for maintaining a slaughter house within the city limits at a certain time in the year 1892, evidence is immaterial as to what the boundaries were in 1886.—*Id.*..... 547

See CERTIORARI, 5, ELECTIONS AND VOTERS; EMINENT DOMAIN, 2; NEGLIGENCE, 1, 2; PUBLIC LANDS; STATUTES, 1; TAXATION, 3.

NEGLECTANCE.

1. *Icy Sidewalks—Liability of City.* A city is not liable for damages for injuries received from falling on an icy sidewalk if the ice is not so rough and uneven, or so rounded up, or at such an incline as to make it an obstruction and to cause it to be unsafe for travel with the exercise of due care.—*Calder v. Walla Walla*..... 377

2. *Same—Instructions.* Where there is testimony tending to show that an accident was due to the slipperiness and smoothness caused by the ice upon a walk, it is error for the court to refuse to instruct the jury that "mere slipperiness of the sidewalk, occasioned by ice or snow, not being accumulated so as to cause an obstruction, is not ordinarily such a defect as will make the city liable for damages occasioned thereby."—*Id.*..... 377

3. *Defective Water Closet—Pleading—Instructions.* In an action for damages caused by the leakage of water from a water closet, where, under the pleadings, no question is raised as to the manner in which the plumbing had been originally done, nor as to the make or construction of the water closet, it is prejudicial error to charge the jury that, unless the best kind of closet known at the time was placed in the building by the defendant, the jury may from that fact alone find him guilty of negligence.—*Bernhard v. Reeves*..... 424

4. *Coal Mining—Ventilating Machinery.* The fact that a coal mining company had stopped its ventilating machinery from Saturday night until Sunday night does not constitute negligence when coupled with the fact that the machin-

NEGLIGENCE—CONTINUED.

ery had been started and continuously run for a period of twelve or fourteen hours before an explosion of gas occurred on Monday morning.—*Morgan v. Carbon Hill Coal Co* 577

5. *Same—Contributory Negligence.* Where a miner assured a "fire boss" about to test the air in a gangway in a mine that there was no gas there, and the "fire boss" resting upon such assurance opened his lamp to light his pipe, and an explosion ensued, killing the miner, such remark on the part of the miner amounted to contributory negligence.—*Id* 577

See CARRIERS, 1, 2; DAMAGES, 1; HORSE AND STREET RAILROADS, 1; MASTER AND SERVANT, 1, 2, 4; MUNICIPAL CORPORATIONS, 4, 5; RAILROAD COMPANIES.

NEGOTIABLE INSTRUMENTS.

1. *Action on Note—Assessment of Attorney Fees by Court.* The fact that the court, in an action upon a promissory note, assessed the amount of attorney's fees due thereon, and added same to the verdict of the jury, is not prejudicial error.—*Yakima National Bank v. Knipe* 348
2. *Promissory Notes—Provision for Attorney Fees—Effect Upon Negotiability.* A condition in a promissory note providing for the payment of attorney fees in the case of a suit to enforce its collection, does not affect the negotiability of the note.—*Second National Bank v. Anglin* 403
3. *Promissory Notes—Default in Payment of Interest—Maturity of Note.* In a suit to foreclose a mortgage securing a promissory note and coupon interest notes the plaintiff is not entitled to judgment for the interest notes not due, although the note in terms provides that in case of default in payment of any interest when due, the principal note and interest coupons shall mature and become payable at once at the option of the holder.—*Cloud v. Rivord* 555
4. *Same—Contract for Interest After Maturity.* Where a promissory note provides that it shall bear interest at the rate of four per cent. per month after maturity, such contract applies to the definite time set for the payment of the note, and not to the maturity arising by reason of a default in the payment of an installment of interest.—*Id* 555
5. *Action on Note—Attorney Fees.* Where a promissory note contains a provision for the payment of an attorney's fee in case of suit to collect principal or interest, such provi-

NEGOTIABLE INSTRUMENTS—CONTINUED.

sion must be construed as a promise to pay a reasonable attorney's fee, and when plaintiff, in an action on such note, has alleged and proved a reasonable attorney's fee, he is entitled to judgment therefor.—*Id* 555

See ALTERATION OF INSTRUMENTS, 1-4; HUSBAND AND WIFE, 5; PARTIES, 2.

NEW TRIAL.

1. *Insufficiency of Evidence.* A new trial may be awarded, although the verdict be supported by some evidence, where it appears that the evidence is insufficient to justify the verdict.—*Pederson v. Seattle, etc., St. Ry. Co.* 202
2. *New Trial—Newly Discovered Evidence.* Where the complaint in an action for damages alleged that the ties of defendant's road bed were rotten and unsafe, whereby the injury was caused, defendant had sufficient notice to put it upon an investigation of all its road bed at the place where the accident occurred, and the defendant is not entitled to a new trial on the ground that it was surprised at the proof of the defective condition of a particular tie, and that it now has newly discovered evidence to the contrary.—*Booth v. Columbia, etc., R. R. Co.* 531

See CERTIORARI, 1.

NOVATION.

Dissolution of Partnership—Effect as to Creditors. An agreement between parties, whereby the partnership is dissolved and one of them released from liability for past debts, does not bind a creditor to whom notice thereof is sent, when there is no consent or act of acquiescence on his part.—*Wadhams v. Page* 103

NUISANCE. See MUNICIPAL CORPORATIONS, 35, 36, 39.

OFFICE AND OFFICER.

1. *County Officers—Terms of Office—Constitutional Law.* A prosecuting attorney holding office under the provisions of art. 27, §6 of the constitution, does not fill such a term as is contemplated by art. 11, §7 of the constitution, which prohibits a county officer from holding more than two terms in succession.—*Smalley v. Snell* 161
2. *Verification Before Deputy County Clerk—Jurat Should be Signed in Deputy's Name.* When the verification to an in-

OFFICE AND OFFICER—CONTINUED.

formation is made by the prosecuting attorney before the deputy county clerk, it is proper that the jurat should be signed by such officer in his own name; and it is unnecessary that he sign, in such case, in the name of his principal by himself as deputy.—*State v. Devine*..... 587

See COURTS, 3; JURY, 2.

PARTIES.

1. *Action for Breach of Contract—Lease of Community Land—Parties.* The fact that one of two joint lessees paid all the money on the contract of lease does not warrant an action by him alone for breach of the contract.—*Dietz v. Winehill* 109
2. *Action Upon Note—Blank Indorsement—Real Party in Interest.* In an action upon a promissory note by an indorsee, who makes the payee a party defendant, the production of the note in evidence with an indorsement in blank thereon, is sufficient to *prima facie* establish the fact that the plaintiff is the owner.—*Yakima National Bank v. Knipe* 348
3. *Defect of Parties Plaintiff—Estoppel of Defendant.* Where a person is joined as a party plaintiff in an action by an amended complaint, after the answer of defendants had averred such person had an interest in the controversy, the defendants cannot afterward, on appeal, raise the objection that such additional party plaintiff is not a party in interest.—*Shepard v. Hill*..... 605

See EMINENT DOMAIN, 2; HUSBAND AND WIFE, 5;
SCHOOLS AND SCHOOL DISTRICTS, 1.

PARTNERSHIP.

Liability of Incoming Partner. An incoming partner, in the absence of some agreement assuming past indebtedness, becomes liable only for the future, and not for the preëxisting, debts of the partnership.—*Wolff v. Madden*..... 514

See JUDGMENT, 2; NOVATION.

PLEADING.

1. *Motion to Strike Answer—When Improper.* In an action for damages to abutting property from the construction and operation of a railroad in a street, an answer by the railroad company which is, in effect, a plea of license from the city to construct and operate their railroad in the street cannot be stricken out on the ground of irrelevancy or immateriality.—*Hatch v. Tacoma, Olympia, etc., R. R. Co.* 1

PLEADING—CONTINUED.

2. *Demurrer Pending—Answer Not Required.* A plaintiff is not called upon to reply to an affirmative defense while his demurrer to a special defense remains undetermined.—*Ewing v. Van Wagenen*..... 39

3. *Admissions in Pleading—Estoppel—Premature Action—Dismissal.* Plaintiff, on the 25th day of February, 1892, brought an action for goods sold and delivered defendant, alleging that the price became due on the 1st of February, 1892. Defendant answered that by the terms of credit given to defendant the price became due April 1, 1892. The plaintiff replied, admitting that it extended "the time for payment to April 1, 1892, making the same due and payable at said time." *Held*, That, the plaintiff having admitted the extension of time of payment in its pleading, it is estopped to say that such extension was void for want of consideration, and defendant is entitled to judgment of dismissal on the pleadings, on the ground that the action was prematurely brought.—*Rockford Shoe Co. v. Jacob*..... 421

See ALTERATION OF INSTRUMENTS, 4; BONDS; CONTRACTS, 2; EMINENT DOMAIN, 1, 6; ESTOPPEL, 2, 3; EXECUTION, 4; SALE, 2; TROVER AND CONVERSION.

PLEDGE. See CORPORATIONS, 12.

PRACTICE IN CIVIL CASES.

- Amendment of Pleading—Non-suit.* Where leave has been obtained to file an amended complaint to correspond with the proofs, it is error to direct a non-suit for insufficiency of the original complaint, if the proofs show a cause of action.—*Richardson v. Carbon Hill Coal Co.*..... 52

See APPEAL, 20.

PRINCIPAL AND AGENT. See ATTACHMENT, 9; FRAUDULENT CONVEYANCES, 10; MUNICIPAL CORPORATIONS, 33.

PRINCIPAL AND SURETY.

- Notice by Sureties to Obligor to Sue.* Where the principal on a bond is a non-resident and has no property in the state liable to attachment, the sureties on the bond cannot require the obligee, by notice in writing, to forthwith institute an action against the principal.—*Seattle Crockery Co. v. Haley*..... 302

See ATTACHMENT, 6; BONDS.

PROHIBITION.

Enforcing Judgment on Stay Bond Pending Appeal. Prohibition will lie to prevent the superior court undertaking to enforce the collection of a judgment against sureties on a bond for stay of execution, when notice of appeal from such judgment has been given and a *supersedeas* bond filed by the sureties.—*State, ex rel. McDonald, v. Superior Court*..... 112

PROMISSORY NOTES. See ALTERATION OF INSTRUMENTS; NEGOTIABLE INSTRUMENTS.

PUBLIC LANDS.

Entry Within Corporate Limits—Knowledge of Entryman. Under the act of congress of March 8, 1877 (19 St. at Large, p. 392), where entry had been regularly made upon vacant unoccupied land of the United States, within the limits of an incorporated town, which was not settled upon, nor used for municipal purposes, and such land was afterwards ascertained to be within the corporate limits of a town, it was the duty of the secretary of the interior to issue a patent therefor to the entryman, regardless of knowledge on the entryman's part that such land was within the corporate limits.—*Alger v. Hill*..... 358

See EMINENT DOMAIN, 4.

RAILROAD COMPANIES.

Injuries at Crossings—Contributory Negligence. A person injured by collision with a train at a railroad crossing is not chargeable with contributory negligence, if he looks for the train before driving upon the track and cannot see it by reason of intervening trees and embankments, nor hear it on account of the rattle of his own and other vehicles upon the roadway.—*Ladouceur v. Northern Pacific R. R. Co*..... 280

See TAXATION, 1.

REGENT OF AGRICULTURAL COLLEGE. See COURTS, 3.

RELEASE AND DISCHARGE.

Sufficiency of Evidence—Burden of Proof. An allegation by a plaintiff that his signature to a written release exempting defendant from liability for injuries received through the latter's negligence was secured from him by fraud is not sufficiently supported by proof on plaintiff's part that

RELEASE AND DISCHARGE—CONTINUED.

he was misinformed as to the contents, and did not understand the nature of the paper he signed, while three witnesses, who were present at the time, testify that the release was read over and explained to plaintiff twice before he signed it, and that he then said he understood it; especially in view of the fact that the burden of proof is upon plaintiff, and the other testimony in the cause tends to corroborate defendant's side of the issue.—*Pederson v. Seattle, etc., St. Ry. Co.*..... 202

REPLEVIN.

Agreement as to Custody of Moneys—Liability of Parties.

Where certain goods in controversy have been converted into money, which has been placed in possession of an officer of the court by consent of all parties to the action, and the only question to be decided is as to which of the parties should receive said moneys from such officer, neither party can be held responsible for the safe keeping of such moneys as against the other.—*Mansfield v. First National Bank*..... 608

SALE.

1. *Failure to Record Bill of Sale—Effect.* The failure to record a bill of sale within ten days after its execution, where the purchaser does not take possession of the property, renders it void only as to such parties as obtain intervening rights between the time of its execution and of its recording.—*Sayward v. Nunan*..... '87
2. *Articles Manufactured to Order—Statute of Frauds.* Although a complaint may be based upon a contract of sale which is void within the statute of frauds, yet where the case made by the answer and reply, and tried without objection by the defendant, shows the contract to be one for the manufacture and delivery of an article, the statute of frauds has no application.—*For v. Utter*..... 299
3. *Same—Delivery and Acceptance.* In case of the manufacture of specific articles upon order, a tender of the manufactured article is a sufficient delivery, without its acceptance by the purchaser.—*Id*..... 299
4. *Same.* If, upon the tender of a manufactured article ordered by the purchaser, defects of construction or departure from the terms of contract are alleged, they must be pointed out within a reasonable time, and the maker given a chance to repair defects, or acceptance will be presumed.—*Id*..... 299

SALE—CONTINUED.

5. *Bill of Sale—Recording.* Under § 1454, Gen. Stat., no sale of personal property is valid as against existing creditors or innocent purchasers, where the property is left in the possession of the vendor, unless such sale be evidenced by a memorandum in writing, and such memorandum be recorded in the auditor's office of the county in which the property is situated within ten days after such sale.—*Whiting Mfg. Co. v. Gephart*..... 615
6. *Same—Effect of Returning Goods to Original Owner.* Where there has been an absolute delivery of goods under a contract of sale, thus resting title in the purchaser, and he has sold a portion of the goods, an agreement to return the remaining goods to the original owner does not amount to a rescission of the original contract of sale, but to a re-sale of the goods, and is void as to creditors, when there is no delivery of possession nor any bill of sale executed and recorded.—*Id*..... 615

See CHATTEL MORTGAGES, 2; EVIDENCE, 1, 2.

SCHOOLS AND SCHOOL DISTRICTS.

1. *Liability for Materials Furnished Contractors.* It is not necessary that a school district should be made a party to a suit against a contractor for materials furnished in the construction of a school house in order to subject the district to liability for failure to take a bond from the contractor as required by Laws 1887-8, p. 15.—*Pacific Mfg. Co. v. School District No. 7*..... 121
2. *Same—Constitutional Law.* Laws 1887-8, p. 15, requiring bonds to be taken by school districts as municipal corporations does not violate art. 9, sec. 2, of the constitution, providing that "the entire revenue derived from the common school fund, and the state tax for common schools, shall be exclusively applied to the support of the common schools." *Id*..... 121

STATUTES.

1. *Purchase of Water Works—Title of Act.* The provision of the act of March 26, 1890 (Laws 1889-90, p. 520), authorizing cities to purchase water works and light plants which had theretofore been erected by private enterprise, is sufficiently expressed in the title of the act, which reads, "An act authorizing cities and towns to construct internal improvements, and to issue bonds and pay therefor."—*Seymour v. Tacoma*..... 138

STATUTES—CONTINUED.

2. *Repeal of Special by General Acts.* Where an act, general in terms, contains such reference to special acts as to show an intent on the part of the legislature thereby to repeal or change them, the rule that general acts have no effect upon special ones, though covering the same subject matter, must yield to the manifest intention of the legislature.—*Germond v. Tacoma*..... 365
3. *Regularity of Passage—Conclusiveness of Enrolled Bill.* The enrolled bill on file in the office of secretary of state of an act of the legislature, which is duly signed by the presiding officers of both houses, and otherwise appears fair upon its face, is conclusive evidence of the regularity of all proceedings necessary for its proper enactment in conformity with the constitutional provisions.—*State, ex rel. Reed, v. Jones* 452

See MUNICIPAL CORPORATIONS, 10, 19.

TAXATION.

1. *Gross Earnings Law—Exemption of Railroad Property—Constitutional Law.* The act of November 28, 1883, known as the "gross earnings law," which exempted railroad property from taxation and substituted a tax upon the gross earnings of the railroads, was not in conflict with § 1924 of the organic act, requiring all taxes to be equal and uniform, and that no distinction be made in the assessments between different kinds of property.—*Columbia, etc., R. R. Co. v. Chilberg*..... 612
2. *Same.* Under said act all the property of the railroads was exempted, whether actually used in the operation of the roads or not.—*Id* 612
3. *Restric'tion Upon Municipal Corporations to Impose Taxes.* Where the charter of a city limited its right to impose taxes upon all property within the city to that "taxable for territorial and county purposes," the city had no right to impose taxes upon a railroad whose property was exempted by territorial law.—*Id* 612

See BANKS AND BANKING, 1, 2; MUNICIPAL CORPORATIONS, 6-9, 19.

TRIAL.

1. *Instructions—Harmless Error.* Although detached expressions in the court's charge to a jury, if considered as independent expressions, may be technically erroneous, yet if

TRIAL—CONTINUED.

- the instructions as a whole, and considered together, fairly state the law, in nowise misleading the jury, there is no prejudicial error.—*Seattle Gas, etc. Co., v. Seattle*..... 101
2. *Failure to Prove Burden of Issue—Instructing Jury for Plaintiff.* Where the defendant in an action of debt admits the indebtedness but sets up an affirmative defense which throws the burden of the issue on him, and the undisputed proofs show a failure to prove the facts necessary to sustain such defense, the jury should be instructed to find a verdict for the plaintiff.—*Wadhams v. Page*..... 103
3. *Argument of Counsel—Inferences From Facts Proved.* Where the evidence, in an action for injuries as the result of negligence in the operation of an electric car, shows that the motorman in charge of the car at the time was discharged about three weeks later, but does not show the reason of his discharge, it is not improper argument for counsel for plaintiff to draw the inference from such fact and argue it to the jury, that the discharge of the motorman was on account of his carelessness at the time of the accident.—*Sears v. Seattle, etc., St. Ry. Co.*..... 227
4. *Admission of Improper Testimony—Cured by Striking Out.* Where error is committed in permitting plaintiffs to ask a witness a question with a view to his impeachment, the error is harmless where the witness denies the imputed declarations and the testimony of the impeaching witness is subsequently stricken out by the court on motion of the defendant.—*Id.*..... 227
5. *Indefinite Instructions.* Where the only objection to an instruction is that it is too general in its terms, the proper practice is to move to make it more specific.—*Enoch v. Spokane Falls, etc., Ry. Co.*..... 398
6. *Non-suit.* In an action to recover a balance due upon account, it is error to non-suit the plaintiff, when it appears from the evidence that he had given an order to a third party for the sum due from defendant, on the supposition that it was a certain amount, but in fact, as the evidence showed, there was a further balance due him.—*Patchen v. Parke & Lacy Machinery Co.*..... 486
7. *Proper Cross-examination.* Where a witness is put upon the stand to identify the signature to a receipt which was claimed to have been given such witness, as defendant's agent, in full of account, and was offered for the purpose of proving payment, such witness may be properly cross-

TRIAL—CONTINUED.

- examined as to the moneys he has received and paid out for and on account of the plaintiff.—*Id.*..... 486
8. *Right to Non-suit Not Waived by Introduction of Evidence.* Although a defendant may go into his defense after the denial of his motion for a non-suit, he is entitled to the benefit of such motion if, at the time the proofs are finally closed, they are not sufficient to establish a *prima facie* case for the plaintiffs.—*Morgan v. Carbon Hill Coal Co.*..... 577
9. *Instructions—Harmless Error.* Where an instruction, taken altogether, fairly informs the jury of the law, it will be upheld, although separate clauses in themselves may be misleading.—*Duggan v. Pacific Boom Co.*..... 593
10. *Joinder of Proper and Improper Matter in Requested Instructions.* Although a defendant may be entitled to have a certain requested instruction given for the purpose of making more definite a matter touched upon by the court in its charge, yet, if he embodies with that instruction other matter that is improper, it is not error for the court to refuse to give the instruction as a whole.—*Id.* 593
- See APPEAL, 15; CARRIERS, 1; CONSTITUTIONAL LAW; EXECUTION, 4; MASTER AND SERVANT, 2, 4; NEGLIGENCE, 2, 3; PRACTICE IN CIVIL CASES.

TROVER AND CONVERSION.

Conversion of Mortgaged Chattels—Action by Mortgagee. A complaint by a mortgagee of chattels against a subsequent mortgagee for their conversion does not state facts sufficient to constitute a cause of action, when it contains no allegation of actual possession by plaintiff at the time of the alleged conversion, nor of his right to possession, nor of demand for possession.—*Binnian v. Baker*..... 50

VENDOR AND PURCHASER.

Rescission—Placing Party in Statu Quo—Tender. In an action to obtain the re-conveyance of land on the ground of fraudulent misrepresentation, a tender of the purchase price less the commission paid the agent negotiating the sale, he being the agent of the party seeking rescission, is not sufficient to uphold the action.—*Wood v. Nichols*..... 96

See COVENANTS, 1, 2, 3; EVIDENCE, 6; HUSBAND AND WIFE, 8.

VENUE IN CIVIL CASES.

Enforcement of Loggers' Lien. An action to foreclose a logger's lien is properly brought in the county where the logs were cut and the lien notice filed, regardless of the fact that the logs are in another county.—*Overbeck v. Calligan*..... 342

WILLS.

Revocation. A will devising all the testator's real estate to his wife, and which expressly declares that it is the last will and testament of the testator, cannot be construed as a codicil to a former will whereby all the real estate was devised to the wife, and certain sums bequeathed to the children, but such former will is necessarily revoked by the last one; and the last will not naming or providing for the children is inoperative as to them.—*Mason v. McLean*..... 31

WITNESS.

Credibility—Former Conviction for Misdemeanor. The former conviction of a witness for the commission of a misdemeanor cannot be proved for the purpose of affecting his credibility.—*State v. Payne*..... 563

See COSTS, 1; EVIDENCE, 3, 4; TRIAL, 4, 7.

WRITS.

1. *Service by Publication—Affidavit.* An affidavit, upon which publication of summons in an action is based, is not sufficient under Laws of 1887-8, p. 26, §5, when it alleges merely that the defendants "are absent from the county of Pierce, and that their place of residence is unknown."—*State, ex rel. Boyd, v. Superior Court*..... 352
2. *Same—Sufficiency of Publication.* Under a statute requiring publication of summons to be made not less than once a week for six consecutive weeks, six publications is sufficient, where it is made once in each of six consecutive weeks.—*Id.*..... 352



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